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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 324

HARRY M. AVANCE,

Petitioner,

vs.

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF

May It Please The Court:

The petition of Harry M. Avance respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

This action under the F. E. L. A. arose out of an accident wherein petitioner, a brakeman twenty-two years of age, sustained the loss of both legs when he was knocked from a brake platform and thrown under moving cars during a switching movement. The accident occurred on January 17th, 1942, at Bismarck, Missouri.

Upon the trial in December, 1942, in the Circuit Court of St. Clair County, Illinois, the jury returned a verdict in

favor of petitioner for $125,000.00 which, upon remittitur, was reduced to $100,000.00 and judgment entered for the latter amount (R. 9).[1] Upon appeal this judgment was sustained by the Appellate Court, Fourth District (R. 77). Thereafter the Supreme Court granted a petition for leave to appeal and, holding that petitioner had not proved interstate commerce as a matter of law, reversed the decision of the Circuit and Appellate Courts and remanded the entire cause for a new trial (R. 87).

The same court had previously held the 1939 amendment to the F. E. L. A. unconstitutional in *Thomson vs. Industrial Commission*, 380 Ill. 386, 44 N. E. (2d) 19. Pursuant to this policy the same court in the instant case not only ignored decisions of the United States Supreme Court directly in point but also refused to recognize and apply the 1939 amendment to the F. E. L. A.[2] which broadened the definition of interstate commerce by including within the coverage of the Act any employe "any part of whose duties as such employe shall be the furtherance * * * or shall in any way directly or closely and substantially * * *" affect interstate commerce. No question was raised in the Appellate or Supreme Court concerning the sufficiency of the evidence to establish the negligence of respondent.

OPINIONS OF THE COURTS BELOW

The opinion of the Appellate Court is reported in *Arance vs. Thompson*, 320 Ill. App. 406, 51 N. E. (2d) 334, and of the Supreme Court in ___ Ill. ___, 55 N. E. (2d) 57. The opinion of the Appellate Court is not contained in the record but that of the Supreme Court will be found commencing at page 81.

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[1] "R." refers to Transcript of Record.

[2] The text of the F. E. L. A. as amended in 1939 will be found set forth in extenso in the Appendix, page 29.

STATEMENT OF CASE

Prior to trial petitioner moved the court for its order requiring respondent to produce "all" records relating to interstate commerce and showing the origin and destination of cars in the train, those switched previous to the accident, and those delivered to the Missouri-Illinois Railroad Company (R. 4, 5). The court allowed this motion (R. 9). Instead of producing such records the respondent filed under oath certain admissions which are verbatim, as follows (R. 28, 29):

"1. As to request No. 1, this defendant admits that one or more cars in the train of engine 1209, which was being operated between Bismarck, Missouri, and Poplar Bluff, Missouri, on January 17, 1942, contained cars and shipments consigned in interstate commerce, and that said train also contained shipments which were solely in intrastate commerce.

"2. This defendant admits that engine No. 1209 did, on the 17th day of January, 1942, prior to the time it departed with a train from Bismarck, Missouri, switch one or more cars which were consigned in interstate commerce and one or more cars which were consigned in intrastate commerce.

"3. This defendant admits that the crew of which plaintiff was a member, on January 17, 1942, either at Bismarck, Missouri, or between Bismarck and Poplar Bluff, Missouri, did at diverse intervals haul, move, switch and transport one or more cars consigned in interstate commerce and one or more cars consigned in intrastate commerce.

"4. Answering request No. 4, this defendant admits that the crew of which plaintiff was a member did, at diverse intervals, on January 17, 1942, deliver one or more cars to the Missouri-Illinois Railroad Company consigned in interstate

commerce, and one or more cars consigned in intrastate commerce.

"5. Answering request No. 5, this defendant admits that firms, persons or corporations had ordered the delivery of one or more cars from without the State of Missouri, and one or more cars from wholly within the State of Missouri, which cars were at one time or another handled by the crew of which plaintiff was a member prior to the time the train departed from Bismarck, Missouri" (R. 28, 29).

Relying upon these sworn admissions the trial court struck out that portion of respondent's answer setting up the Workmen's Compensation Act of Missouri (R. 10). The trial judge thus ruled upon the pleadings, the motion and the sworn admissions that the case was governed by the F. E. L. A. as a matter of law (R. 10). Confirmatory of the court's order petitioner offered in evidence oral testimony and such documents as he could obtain from respondent to establish that at the time of the accident his crew was making up an interstate train, the engine was hauling an interstate car, and the employes were completing an interstate movement. It appeared also without dispute that petitioner's duties as a brakeman in freight and passenger service took him on various runs from Missouri, where he lived and worked off the board, to Dupo, Illinois, Memphis, Tennessee, and Little Rock, Arkansas (R. 12). There was no dispute or conflict in the evidence, which will be detailed in the brief.

The trial court instructed the jury that the rights and liabilities of the parties were governed by the F. E. L. A. (R. 54). Neither party requested that the issue be submitted to the jury (R. 53-62).

The Appellate Court in its opinion set forth verbatim the 1939 amendment and cited the authorities construing it, holding that the F. E. L. A. had been broadened with reference to interstate commerce and stating expressly there was no sub-

stantial controversy on this issue.

The Supreme Court made no reference to the provisions of the 1939 amendment, ignored completely the authorities construing it and in direct conflict with the decisions of this and other federal courts of authority held that both lower courts were in error in deciding that petitioner was entitled to the protection of the F. E. L. A. as a matter of law. The Supreme Court concealed vital and determinative facts not in dispute and misrepresented the contents of the record, particularly the sworn admissions of respondent, with reference to the only *bona fide* issue in the case.

JURISDICTION OF THE COURT

All the courts below found that the rights and liabilities of the parties were to be determined by federal statutes. The judgment of the Supreme Court sought to be reviewed was entered on May 16th, 1944 (R. 87). The action arises under the F. E. L. A. and the jurisdiction of this Court is invoked under Section 237-b of the Judicial Code, as amended by the Act of February 13th, 1925. Cases which sustain jurisdiction of actions under the F. E. L. A. are *Great Northern R. Co. vs. Leonidas*, 305 U. S. 1, and *Chicago, etc., R. Co. vs Devine*, 239 U. S. 52. That a federal question of substance is involved is clear. *St. Louis, S. F. & T. R. Co. vs. Seale*, 229 U. S 156; *Toledo, St. L. & W. R. Co. vs. Slavin*, 236 U. S. 454; *Southern Ry. Co. vs. Crockett*, 237 U. S. 725, and *Norfolk & S. R. Co. vs. Ferebee*, 238 U. S. 269. In the latter case it was said:

> "A substantive right or defense arising under the F. E. L. A. cannot be lessened or destroyed by a local rule of practice."

No case has been found where certiorari has been denied in like circumstances. The Supreme Court of Illinois previously held the 1939 amendment unconstitutional. Con-

fronted with a fact situation making it directly applicable if valid and confronted with the uniform current of authority in opposition to its views, the court so far abandoned its judicial station as to conceal vital facts and to misrepresent the sworn admissions and undisputed evidence in order to defeat the operation of the unpalatable statute. The opinion must not be relied upon because as said in *Norris vs. Alabama*, 298 U. S. 587:

> "Where a federal right is specially claimed in a state court, the United States Supreme Court must inquire whether the right was denied, not merely in express terms, but also in substance and effect, and, if necessary, the evidence must be examined."

Under the special circumstances of this particular case the opinion and judgment of the Supreme Court should be regarded as final for purposes of certiorari. Tested by its effect upon the rights adjudicated, it is final in every sense of the word. In the original order it is described by the court which rendered it as its "final order" in the cause, although this closing paragraph was deleted by the clerk in condensing the record (R. 87). It is not subject to change, review or re-examination in any subsequent proceeding. Under the doctrine of law of the case and its strict application in Illinois it is final and conclusive now and forever on petitioner's right to a determination as a matter of law that he comes under the F. E. L. A. As said in *Commissioners, etc., vs. Schmidt*, 379 Ill. 130, 39 N. E. (2d) 1012:

> "Where a case has been decided upon appeal by this court and is brought up upon a second appeal involving the same questions, the only question open for consideration is whether the trial court followed the mandate of this court."

The opinion and judgment herein further preclude petitioner from contending in any court except this one that he is entitled to the protection of the F. E. L. A. as a matter of

law. In Illinois questions decided on a previous appeal will not again be considered by the court on a second appeal. In that state this doctrine is so thoroughly established as to admit of no further doubt: *Norton vs. Moshier*, 114 Ill. 146, 28 N. E. 463; *Smyth vs. Neff*, 123 Ill. 310, 17 N. E. 702; *West vs. Douglas*, 145 Ill. 164, 34 N. E. 141; *Dempster vs. People*, 183 Ill. 321, 55 N. E. 713; *Union Nat'l Bank vs. Post*, 192 Ill. 385, 61 N. E. 507; *Penn. Plate Glass Co. vs. Rice Co.*, 216 Ill. 267, 75 N. E. 246; *People vs. Drainage Comm.*, 282 Ill. 514, 118 N. E. 742; *People vs. Keokuk, etc., Co.*, 295 Ill. 176, 129 N. E. 87; writ of error dismissed, 258 U. S. 613; *Stevenson vs. Stevenson*, 297 Ill. 338, 130 N. E. 771; *City of Chicago vs. Callin*, 316 Ill. 104, 146 N. E. 741; *Somonauk Bank vs. Hagen*, 286 Ill. App. 621, 3 N. E. (2d) 892; *Underground Const. Co. vs. Sanitary Dist.*, 289 Ill. App. 609, 6 N. E. (2d) 696; *Vick vs. Ill. Bankers Life*, 292 Ill. App. 341, 11 N. E. (2d) 46; *Country Club, etc., Co. vs. Gillham's Estate*, 294 Ill. App. 184, 13 N. E. (2d) 631; *Knowles, etc., Co. vs. Nat. Plate Glass Co.*, 301 Ill. App. 128, 21 N. E. (2d) 913; *Review, etc., Co. vs. McCoy*, 303 Ill. App. 444, 25 N. E. (2d) 549; *Ritter vs. Ritter*, 313 Ill. App. 407, 40 N. E. (2d) 565; *Duncan, etc., Corp. vs. Parking, etc., Corp.*, 321 Ill. App. 299, 53 N. E. (2d) 9.

The opinion and judgment are final on all federal questions which were or could have been presented. *Bonner vs. Gorman*, 213 U. S. 89; *Yazoo, etc., R. Co. vs. Adams*, 180 U. S. 1.

Originally this Court held that only the face of the judgment could be considered in determining finality. *Hazeltine vs. Bank*, 183 U. S. 130. This rule was abandoned in *Clark vs. Williard*, 292 U. S. 112, in favor of the more liberal doctrine that the opinion should be considered in determining the nature and scope of the order or judgment entered. This shift of position is more in line with the doctrine of *Ex parte Tiffany*, 252 U. S. 32, that for purposes of appellate jurisdiction a final judgment and decree is the same thing as a final

decision. Recently under more liberal interpretation it has been held that finality must be determined in accordance with substance and not merely by form, this Court stating in *The Department, etc., vs. Pink*, 317 U. S. 264:

> "For the purpose of the finality which is prerequisite to a review in this court, the test is not whether under local rules of practice the judgment is denominated final * * * but rather that the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review by a state court."

Historically the appellate jurisdiction of this Court was conferred to guarantee the paramount authority and supremacy of federal law. Its major, if not sole, purpose was to effectuate the mandate that the Constitution and the acts of Congress and treaties should be the supreme law of the land.

While it may well have been the intention of the Judicial Code to restrict the obligatory appellate jurisdiction to a narrow class of cases, yet without defeating the constitutional and legislative purpose this cannot be true of its discretionary jurisdiction. As applied to the case at bar no prohibition appears in the Judicial Code itself. To self-impose one by making a fetish of finality, which this Court has recently declared should be determined by substance and not form, from the effect upon ultimate rights and not procedural attributes, would be most unwise. When under Illinois law the decision, in truth and fact, is final and so considered by the court which rendered it, petitioner should not be relegated to years of relitigation, prohibitive from the standpoint of expense and delay, before an opportunity of review in this Court. This would be a sorry remedy, indeed.

No conception of finality should be entertained which would thus permit the state courts to circumscribe at will the discretionary jurisdiction of the Supreme Court of the

United States contrary to the rule of *Powell vs. Supervisors, etc.*, 150 U. S. 433. The rigid concept of finality originally adopted as a labor saving device has resulted in useless delays and great expense for litigants, courts and counsel. See Thurman Arnold, 41 *Yale Law Journal*, page 539.

The purpose of the finality rule and the interests of judicial integrity can be served only by an inquiry into the record to ascertain whether it be true or false that the Supreme Court has misrepresented the facts to defeat the operation of a federal statute. If the claim be true, then by reversal and reinstatement of the judgment the litigation is ended. A decision on the validity, effect and application of the 1939 amendment will save the bench and bar of the nation, the carriers and their injured employes, a great deal of expense, uncertainty and needless litigation which is bound to follow decisions like the one here under review.

It would be a perverse application of a labor saving device for this Court to sit idly by and permit years of relitigation under an erroneous decision with the ultimate object of assuming jurisdiction at its close, cancelling what has been done, laying down correct standards and then starting the process all over again. And this, especially, where there is a conflict on constitutional and federal questions between the Supreme Court and the Appellate Court of the particular state and in the same case!

It is now definitely settled that the court will consider the opinion as an aid in construing the order. *Great Lakes Dredge & Dock Co. vs. Huffman*, 319 U. S. 293; *Metropolitan Water Co. vs. Kaw, etc.*, 223 U. S. 519. Consideration of the effect upon "the ultimate right" is now definitely required by *The Department, etc., vs. Pink*, 317 U. S. 264.

It is respectfully submitted that the full extent of this Court's power should be made available to petitioner by certiorari.

THE QUESTION PRESENTED

The issues of negligence, contributory negligence and damages were submitted to the jury (R. 53-62). The Appellate Court thoroughly considered the issues of damages and approved the decision of the trial court with respect to both interstate commerce and damages. In Illinois the decision of the Appellate Court in a personal injury case is final with respect to damages and the Supreme Court has no power to consider that question, as held in *Pipal vs. Grand Trunk W. R. Co.*, 341 Ill. 320, 173 N. E. 372; *Smith vs. C. P. & St. L. Ry. Co.*, 236 Ill. 369, 86 N. E. 150; *McCulloch vs. Illinois Steel Co.*, 243 Ill. 464, 90 N. E. 664; *Sheridan vs. Peoria Ry. Co.*, 241 Ill. 469, 89 N. E. 798.

In the Supreme Court the only *bona fide* issue was that of interstate commerce. As evidenced by the opinion (R. 81) nothing else was deemed of sufficient importance to merit attention except an admonition that an explanatory instruction should hereafter be given to juries with reference to mortality tables. While the court did state that its decision on interstate commerce rendered unnecessary a consideration of other instructions, it is noteworthy that immediately following this remark the court, in view of a new trial, indicated its opinion with reference to a proper instruction on life expectancy, adding that it was only done "for the benefit of the parties" and that they would not have reversed the case "because of this evidence alone." Resorting to the opinion as an aid in construing the judgment it is clear that the sole and the isolated issue in the Supreme Court was:

> Did the evidence warrant the lower courts in holding as a matter of law that petitioner was entitled to the protection of the F. E. L. A.?

It is this sole issue with its related question of constitutionality, effect and application of the 1939 amendment that we now seek to have resolved by this Court.

II.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Supreme Court of Illinois erroneously failed to recognize the validity, authority and effect of the 1939 amendment to the F. E. L. A. and erroneously decided a federal question of substance in conflict with the decisions of this Court, the Circuit Courts of Appeal, and the courts of last resort of various states, to-wit:

A. In that in *Thomson vs. Industrial Commission*, 380 Ill. 386, 44 N. E. (2d) 19, wherein the 1939 amendment was directly held unconstitutional it inaugurated a policy culminating in the decision below, which refuses to recognize the validity and application of the amendment but renders the same void and nugatory, in direct conflict with the decision of this Court in *Illinois Central R. Co. vs. Behrens*, 233 U. S. 473.

B. In that the opinion and decision below purposely ignored and refused to follow the paramount authority of *Philadelphia & R. Co. vs. Hancock*, 253 U. S. 284, which is directly in point on the determinative feature.

C. In that by refusing to apply the 1939 amendment to undisputed facts requiring its application, the court in the opinion and judgment below impliedly held the amendment to be unconstitutional (it was expressly so held in *Thomson vs. Industrial Commission*, 380 Ill. 386, 44 N. E. (2d) 19) in direct conflict with various appellate tribunals in the following states:

New York:

Wright vs. New York Central R. Co., 263 App. Div. 461, 33 N. Y. S. (2d) 531.

Pennsylvania:

Scarborough vs. Pennsylvania R. Co., 154 Pa. Super. 124, 35 Atl. (2d) 603.

Indiana:

Prader vs. Pennsylvania R. Co., 113 Ind. App. 518, 49 N. E. (2d) 387.

Kansas:

Piggue vs. Baldwin, 154 Kan. 708, 121 Pac. (2d) 183.

Williams vs. Chicago, R. I. & P. R. Co., 155 Kan. 813, 130 Pac. (2d) 596.

Skanks vs. Union Pacific R. Co., 155 Kan. 584, 127 Pac. (2d) 431.

New Jersey:

McFadden vs. Pennsylvania R. Co., 130 N. J. L. 601, 34 Atl. (2d) 221.

California:

Southern Pac. Co. vs. Industrial Accident Commission, 19 Cal. (2d) 271, 120 Pac. (2d) 880.

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Lewis vs. Industrial Commission, 19 Cal. (2d) 284, 120 Pac. (2d) 886.

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Arkansas:

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Tennessee:

Louisville & N. R. Co. vs. Potts, 178 Tenn. 425, 158 S. W. (2d) 729.

Iowa:

McCall vs. Pitcairn, 232 Iowa 867, 6 N. W. (2d) 415.

Wisconsin:

Great Northern R. Co. vs. Industrial Comm., 245 Wis. 375, 14 N. W. (2d) 152.

D. In that the decision below is in direct conflict with that of the Seventh Circuit Court of Appeals (in which circuit Illinois is located) in the case of *Edwards vs. B. & O. R. Co.*, 131 F. (2d) 366, and of other federal courts in such cases as *Ermin vs. Pennsylvania R. Co.*, 36 F. Supp. 936, and *Agostino vs. Pennsylvania R. Co.*, 50 F. Supp. 726.

E. In that irrespective of the constitutionality, effect and application of the 1939 amendment, and considered solely from the standpoint of the scope of the F. E. L. A. before its passage, the opinion and decision below is in direct conflict with the uniform current of authority in both state and federal courts, and contrary to *Philadelphia & R. Co. vs. Hancock*, 253 U. S. 284; *Reading Co. vs. Larkin*, 114 F. (2d) 416; *Wabash Ry. Co. vs. Bridal*, 94 F. (2d) 117; *Sullivan vs. Wabash R. Co.*, 23 F. (2d) 323; *Youngstown & O. R. Co. vs. Halverstodt*, 12 F. (2d) 995; *Davis vs. Dowling*, 284 F. 670; *Pipal vs. Grand Trunk Western R. Co.*, 341 Ill. 320, 173 N. E. 372; *Herb vs. Pitcairn*, 306 Ill. App. 583, 29 N. E. (2d) 543; *Mitchell vs. L. & N. R. Co.*, 375 Ill. 545, 31 N. E. (2d) 965; *Benson vs. Chicago, R. I. & P. R. Co.*, 267 Ill. App. 11, aff'd 185 N. E. 244, 352 Ill. 195.

F. In holding that the question of interstate commerce should have been submitted to the jury in direct conflict with the uniform current of authority in both state and federal court which holds that where the facts are undisputed the question of interstate commerce is one of law for the court and not one of fact for the jury. (Authorities under E, *supra*.)

It is essential that a writ be granted in order to determine

important questions relating to the validity, construction and interpretation of the 1939 amendment to the F. E. L. A. and, specifically, to determine whether the Illinois Supreme Court shall be permitted to continue its policy of frustrating the operation of a federal statute and ignoring and refusing to follow the decisions of the United States Supreme Court and other federal courts construing it.

PRAYER

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Illinois, commanding said court to certify and send to this Court a transcript of the record in the case entitled "*Harry M. Avance, Plaintiff-Appellee, vs. Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a Corporation, Defendant-Appellant,* No. 27864," including also the proceedings in said Supreme Court, to the end that said cause may be reviewed and determined by this Court and the judgment of the Supreme Court be reversed and that the judgment of the Circuit Court of St. Clair County and of the Appellate Court, Fourth District, be reinstated herein.

HARRY M. AVANCE, *Petitioner.*
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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF CASE

The facts are utterly without dispute. The work of Avance as a freight and passenger brakeman took him from Poplar Bluff, Missouri, where he worked off the board, to Dupo, Illinois, Memphis, Tennessee, and Little Rock, Arkansas (R. 12). On the morning of the accident his crew reported for work at Bismarck, Missouri, at 6:30 A. M. (R. 13). They started to make up train number 57 (R. 13). From 7:00 until 9:00 o'clock the crew engaged in switching cars, both loads and empties, and had placed a number of cars in their train on track 7 before the accident occurred (R. 4). Admittedly some of these cars were interstate (R. 28).

The train being prepared was a regularly scheduled freight train operating from Bismarck to Poplar Bluff, both in Missouri, and its scheduled departure time from Bismarck was 7:00 A. M. (R. 13, 45). When the train left that morning it carried PTX-4741 billed to Texarkana, Arkansas (R. 25). At the time of the accident this interstate car was being hauled and moved by the engine (R. 24).

About 9:00 o'clock the crew delivered twenty or thirty cars to the Missouri-Illinois Railroad Company (R. 14). Admittedly this delivery was an interstate one (R. 29).

The delivery to the M. & I. also involved a pick up, and in returning to the yard the crew brought back four cars, one of which was PTX-4741 (R. 24). It was about three-quarters of a mile from the M. & I. delivery to the place where the accident occurred (R. 14). Avance walked back and had just joined his crew when the movement occurred which resulted in the accident (R. 14, 15). There was only one de-

livery to the M. & I. that day (R. 27). It will be noted that at the time of the accident the crew was returning from an interstate delivery to another railroad company and was hauling PTX-4741, an interstate car, for placement in train number 57. This car as well as the three others brought back from the M. & I. came in that morning on number 93 from St. Genevieve, Missouri. Train number 93 entered the State of Missouri from the State of Illinois at St. Genevieve, Missouri, which as any map will show, is directly on the state line. Its population is 2,662. As said by Conductor Maddock, the four cars being hauled by the engine "came over from the M. & I. that comes into St. Genevieve from Illinois" (R. 25, 26). Train 93 came into Bismarck, Missouri, from Illinois that very morning (R. 26).

On the way back from the M. & I. delivery, the crew stopped at the coal chute in order to spot two loaded coal cars and to pick up three empties and take them along over in the yard (R. 30). It was while kicking the three empty coal cars out of their way that the accident occurred.

The origin and destination of the five coal cars does not appear because respondent did not produce its records with respect to them, but the wheel report as well as the testimony of Conductor Maddock shows that PTX-4741, which was also being hauled and moved by the engine, and which came in on train number 93, was on its way either from the State of Illinois or Missouri to the State of Arkansas (R. 24, 25, 65). The conductor testified without dispute that "leaving Bismarck that day according to the wheel report, among the eleven cars that we had, two of them were going to Texarkana, Texas or Arkansas" (R. 25).

By sworn admissions the respondent conceded that train 57 was an interstate one, that the crew switched interstate cars in the yard before the accident occurred and that the delivery to the M. & I. was an interstate one (R. 28, 29).

It was the purpose of the crew in doing their switching work to make up their train on track number 7 and also to make up a cut of cars on track number 8 to be taken to the M. & I. (R. 32). All the switching was for those two purposes (R. 32). The movement which caused the accident took only a few minutes (R. 34). It was necessary for the crew before leaving for Poplar Bluff to make up their train, do the yard work, make the M. & I. delivery, and put the three empty coal cars, whose bumping caused the accident, over in the yard (R. 30-31, 39-40).

SPECIFICATION OF ERRORS TO BE ARGUED

The Supreme Court of Illinois erred:

1. In holding that the issue of interstate commerce should have been submitted to a jury.

2. In refusing to recognize and apply the 1939 amendment to the F. E. L. A.

3. In holding against the application and validity of the 1939 amendment to the F. E. L. A.

ARGUMENT

I.

Where the Facts Are Undisputed the Question of Interstate Commerce Is One of Law.

In *Philadelphia & Reading Ry. Co. vs. Hancock*, 253 U. S. 284, holding that cars were in interstate commerce although merely on their way to a classification yard and not yet inspected, weighed or billed to consignees in another state, this Court said:

> "The essential facts are not in controversy; the nature of the employment, therefore, is a question of law."

This is the universal rule in both federal and state courts throughout the country, including Illinois. *Edwards vs. B. & O. R. Co.*, 131 F. (2d) 366; *Lukon vs. Pennsylvania R. Co.*, 131 F. (2d) 327; *Reading Co. vs. Larkin*, 114 F. (2d) 416; *Wabash Ry. Co. vs. Bridal*, 94 F. (2d) 117; *Sullivan vs. Wabash Ry. Co.*, 23 F. (2d) 323; *Youngstown & O. R. Co. vs. Halverstodt*, 12 F. (2d) 995; *Davis vs. Dowling*, 284 F. 670; *Gidley vs. Chicago Short Line Ry. Co.*, 346 Ill. 122, 178 N. E. 400; *Pipal vs. Grand Trunk W. R. Co.*, 341 Ill. 320, 173 N. E. 372; *Larigne vs. Chicago, M., St. P. & P. R. Co.*, 287 Ill. App. 253, 4 N. E. (2d) 785; *Benson vs. Chicago, R. I. & P. R. Co.*, 267 Ill. App. 11, aff'd 352 Ill. 195, 185 N. E. 244; *Mitchell vs. Louisville & Nashville R. Co.*, 194 Ill. App. 77.

The other state cases are too numerous to cite. The *Donat* case, 239 U. S. 50, and the *Lloyd* case, 239 U. S. 496, cited in the opinion (R. 84) hold that no reversible error appears where a trial court submits the issue to the jury which decides it correctly. Decision that no prejudicial error appears where the issue was submitted to the jury is not tantamount to decision that the failure to have done so would constitute reversible error. These cases are without helpful relevance. This Court in each merely affirmed the decision of the courts below. Both were decided before the *Hancock* case, *supra*.

II.

It Conclusively Appears as a Matter of Law That the Parties Were Engaged in Interstate Commerce Under the 1939 Amendment.

Specifically foreshadowing an amendment to broaden the coverage of the F. E. L. A., this Court in *Illinois Central R. Co. vs. Behrens*, 233 U. S. 473, announced that it entertained no doubt of the power of Congress under the commerce clause of the Constitution to include an employe "whether

the particular service being performed at the time of the injury, isolatedly considered, was interstate or intrastate commerce."

Congress has now exercised such power. In 1939 it amended the F. E. L. A. so that it now includes any employe "any part of whose duties as such employe shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce * * *." Ignoring the *Behrens* case, it was held in *Thomson vs. Industrial Commission*, 380 Ill. 386, 44 N. E. (2d) 19, that the amendment was unconstitutional. The amendment has been sustained and applied in:

Federal cases:

Edwards vs. B. & O. R. Co., 131 F. (2d) 366.

Ermin vs. Pennsylvania R. Co., 36 F. Supp. 936.

Agostino vs. Pennsylvania R. Co., 50 F. Supp. 726.

New York:

Wright vs. New York Central R. Co., 263 App. Div. 461, 33 N. Y. S. (2d) 531.

Pennsylvania:

Scarborough vs. Pennsylvania R. Co., 154 Pa. Super. 124, 35 Atl. (2d) 603.

Indiana:

Prader vs. Pennsylvania R. Co., 113 Ind. App. 518, 49 N. E. (2d) 387.

Kansas:

Piggue vs. Baldwin, 154 Kan. 708, 121 Pac. (2d) 183.

Williams vs. Chicago, R. I. & P. R. Co., 155 Kan. 813, 130 Pac. (2d) 596.

Skanks vs. Union Pacific R. Co., 155 Kan. 584, 127 Pac. (2d) 431.

New Jersey:

McFadden vs. Pennsylvania R. Co., 130 N. J. L. 601, 34 Atl. (2d) 221.

California:

Southern Pac. Co. vs. Industrial Accident Commission, 19 Cal. (2d) 271, 120 Pac. (2d) 880.

Southern Pac. Co. vs. Industrial Accident Commission, 19 Cal. (2d) 283, 120 Pac. (2d) 888.

Lewis vs. Industrial Commission, 19 Cal. (2d) 284, 120 Pac. (2d) 886.

Southern Pac. Co. vs. Industrial Accident Commission, 19 Cal. (2d) 281, 120 Pac. (2d) 887.

Arkansas:

Missouri Pacific R. Co. vs. Fisher (Ark.), 117 S. W. (2d) 725.

Tennessee:

Louisville & N. R. Co. vs. Potts, 178 Tenn. 425, 158 S. W. (2d) 729.

Iowa:

McCall vs. Pitcairn, 232 Iowa 867, 6 N. W. (2d) 415.

Wisconsin:

Great Northern R. Co. vs. Industrial Commission, 245 Wis. 375, 14 N. W. (2d) 152.

These authorities hold that it is now immaterial that the employe might have been engaged in intrastate work at the precise moment of injury. The Circuit Court of Appeals of the Seventh Circuit, wherein Illinois is located, in *Edwards vs. B. & O. R. Co.*, 131 F. (2d) 366, declared the intent of Congress to be clear. Perhaps the best statement of the congressional philosophy is in *Wright vs. New York Central R. Co., supra:*

> "A case would turn upon some slight differentiation in duty or operation, more apparent than real. There was much hair splitting and little certainty. It was to avoid all this and to give a fixity of application that Congress amended this act on August 11, 1939, to include 'any employe of a carrier, any part of whose duties

> as such employe shall be the furtherance of interstate or foreign commerce.' Thus the scope of the statute was broadened so as to include practically all employes of interstate carriers, including such employes as this claimant, and to do away with the borderline cases. Fine distinctions are no longer necessary. The act is now all inclusive and made so purposely. The language 'any part of whose duties' is almost as broad as words can make it and we should apply it in the spirit in which it was written."

In the *Agostino* case the employe was spreading cinder ballast on a new track that had never been used for any kind of commerce. In the three California cases the employe was engaged in intrastate switching. In the *Skanks* case the employe was loading sand bags on a flat car which were later to be used to protect an interstate track from flood. In the *Piggue* case the employe was sweeping up ashes and debris around the station platform and a receiving track. In the *Ermin* case the employe was hauling dead, intrastate engines. In the *Scarborough* case the employe was installing electric lights at Bryn Mawr station, which was used by only three interstate trains a year. In the *Prader* case a section employe was making a seven mile trip by automobile to obtain a rule book so that he could acquaint himself with the duties of a flagman. In the *Potts* case the employe was injured in intrastate switching. In the Wisconsin case the employe was a signal man attached to a crane repairing an ore dock which was out of use. All were held entitled to the protection of the F. E. L. A. under the 1939 amendment.

The Supreme Court not only ignored the decisions of this Court, but also each and every one of the above authorities, which were called to its attention.

III.

Irrespective of the 1939 Amendment the Petitioner Was Engaged in Interstate Commerce as a Matter of Law.

In *Philadelphia & Reading Ry. Co. vs. Hancock*, 253 U. S. 284, it was held that where the cars had started on their journey to a classification yard it was immaterial that they had not yet been billed to a foreign state. Here at the moment of the accident PTX-4741 was on its way to a foreign state. The records with reference to its billing were not produced and hence, as said in *Pipal vs. Grand Trunk W. R. Co.*, 341 Ill. 320, 173 N. E. 372, holding that a local switching movement does not interrupt interstate commerce:

> "Its records were in its possession and it could have introduced them had it seen fit. * * * The failure of a party to a suit to produce evidence available to him gives rise to a presumption against him."

It was said in *Mitchell vs. L. & N. R. Co.*, 375 Ill. 545, 31 N. E. (2d) 965, that under such circumstances "every presumption and intendment will be indulged against defendant." This Court has indicated in *Philadelphia & R. Co. vs. Polk*, 256 U. S. 332, that the presumption is in favor of interstate commerce. One interstate car makes the entire train an interstate one and where an employe is engaged in both kinds of commerce, his remedy is under the Federal Act. *New York Central & H. R. Co. vs. Carr*, 238 U. S. 260; *Youngstown & O. R. Co. vs. Halverstodt*, 12 F. (2d) 995; *Koons vs. Philadelphia & R. Ry. Co.*, 271 Pa. 468, 114 Atl. 262. Preparatory movements in aid of interstate commerce bring the case under the Federal Act whether the particular car being switched was interstate or not and whether a specific train was being prepared. *Benson vs. Chicago, R. I. & P. R. Co.*, 267 Ill. App. 11, aff'd 352 Ill. 195, 185 N. E. 244; *Mitchell vs. L. & N. R. Co.*, 375 Ill. 545, 31 N. E. (2d) 965. A local or temporary switching movement does not terminate

the interstate character of the work. *Herb vs. Pitcairn*, 306 Ill. App. 583, 29 N. E. (2d) 543; *Pipal vs. Grand Trunk W. R. Co.*, 341 Ill. 320, 173 N. E. 372. Members of an interstate train crew who stopped to move a local, intrastate car are under the Federal Act. *Wabash Ry. Co. vs. Bridal*, 94 F. (2d) 117. Going and returning to pick up an interstate car constitutes an entire trip and an incidental stoppage for an intrastate purpose does not interrupt it. *Sullivan vs. Wabash Ry. Co.*, 23 F. (2d) 323; *Davis vs. Dowling*, 284 F. 670. If the accident and injury would delay an interstate movement, then the work is closely related to interstate transportation. *Wabash Railway Co. vs. Bridal*, 94 F. (2d) 117. Number 57 was two hours late in leaving that morning (R. 45).

IV.

Critique of Opinion Below.

It is incredible that the Supreme Court should have overlooked the undisputed evidence that the work of petitioner as a brakeman in freight and passenger service took him to three different states (R. 12). Other features of the court's opinion place a strain on credulity, particularly the misrepresentation of the sworn admissions filed by respondent.

It is said that "On demand of plaintiff defendant filed a number of admissions * * *" (R. 81). This is not true. The motion is clear and definite and sought to obtain the original records (R. 4, 5). This motion the court allowed (R. 9).

It will be noted that the court below held that the entire issue "largely hinges around the movement of this empty tank car PTX-4741" (R. 83). This, of course, is not true. Under the 1939 amendment we are concerned with the duties of petitioner generally as well as upon the occasion in question and the isolated history of PTX-4741 is largely imma-

terial. It is notable that respondent produced no records with reference to the origin of PTX-4741. It is notable that while respondent produced the train switch list of Conductor Rehm for train 93 showing PTX-4741, it did not produce the wheel report, which would have shown its origin.

Instead of producing this document, respondent filed, not at the demand of the petitioner, but for its own convenience, its sworn admissions wherein it conceded the interstate character of petitioner's work (R. 28, 29). Strange, indeed, is the assumption by the court that PTX-4741 "left St. Genevieve, Missouri, to Texarkana, Arkansas * * *" (R. 84). It is far more reasonable to assume that PTX-4741 came from Illinois but whether it did or not, the movement to Arkansas is interstate all the way. The court adds, "There is nothing to show how this car got to St. Genevieve" (R. 84). Nowhere does the court disclose the basis of its novel deduction that a movement from some place other than St. Genevieve, Missouri, to Arkansas might be interstate but one from St. Genevieve, Missouri, to Arkansas might with propriety be deemed by a jury to be intrastate. The court said that it did not "appear that this tank car was billed when it came into Bismarck" (R. 84). The reason it did not so appear was because of the respondent's failure to produce the previous wheel report but, whether it did or not is of no concern under this Court's opinion in the *Hancock* case, which is thus not only ignored but directly repudiated. Billing is not essential to an interstate trip.

Note the following phraseology in the court's opinion: "If it was billed when it left St. Genevieve, Missouri, to Texarkana, Arkansas, it could be inferred it was in interstate commerce." From *Gibbons vs. Ogden* to the *S. E. A. U.* and *National Polish Alliance* cases, it has never been doubted that a movement from one state to another is interstate in character and excludes any necessity for "inferring" by any

tribunal. The court then proceeds with the wholly unfounded and gratuitous assumption that if the car went from St. Genevieve, Missouri, to Texarkana, Arkansas, "unbilled" there could then be a "serious question"! (R. 84).

The requirement that an injured plaintiff or the widow and orphans of a deceased railway employe must dig into the archives of the adversary and establish the precise moment of "billing" is not only contrary to the decision of this Court twenty-five years ago in the *Hancock* case but is also patently ridiculous. It imposes a condition impossible of fulfillment. How will counsel for respondent account for their failure to have included this information, now deemed essential, in their sworn admissions? The court below seems to have been entirely mystified by the absence of any reference to PTX-4741 on what it refers to as "the switching list at the Bismarck yard when the train was made up and left at 10:50 A. M. * * *" (R. 84). We can only assume that what the court refers to as the switching list is actually the "Report of Cars on Hand," being Plaintiff's Exhibits 13 and 14 (R. 73, 74; received R. 27). The only reasonable inference is that the absence of PTX-4741 from Plaintiff's Exhibits 13 and 14 indicates that it was not regarded as one of the "cars on hand." It was not on hand in the Bismarck yard but was merely passing through to Arkansas and thus was omitted from the yard clerk's time check, being Plaintiff's Exhibits 13 and 14 (R. 73, 74; received R. 27). Another undisputed fact is that of the nine cars which the engine was attached to and hauling at the time of the accident (R. 23, 24) seven appear on Plaintiff's Exhibits 13 and 14 (R. 73, 74) as cars on hand but PTX-4741 and PRX-504009 do not (R. 73, 74).

According to the opinion below the hours from 6:30 A. M., when petitioner went on duty, until 9:30 A. M., when the accident happened, do not constitute a part of "the entire day

of January 17th, 1942" (R. 84). Five separate admissions were filed (R. 28, 29). They were numbered separately (R. 28, 29). Were it not for the fact that the court mentioned one of the admissions, it would be supposed that by reason of neglect and inadvertence they had escaped attention. This cannot be so, however, because the court, referring to one of the five admissions, construes it as limited in point of time only to that portion of the day subsequent to the accident (R. 84). The significance of the admission is that the train was interstate in character. The preparation of an interstate train for its journey is as much interstate as the journey itself. The statement of the court that the admission only applies during the entire day and not necessarily prior to the time of the accident indicates that the author of it did not appreciate the significance of the interstate character of the train. He apparently was under the impression that no work in connection with an interstate train could bring one under the F. E. L. A. unless it occurred after the departure of the train from its point of origin.

This apart, the court neglects to mention the other four admissions (R. 28, 29). This could hardly have been the result of inadvertence. Admissions 2, 3, 4 and 5 refer to the work before departure (R. 28, 29). This must necessarily be so because these admissions relate to work done while petitioner was a member of the crew (R. 28, 29). The unjudicial attitude of the court is manifested not only by the omissions and distortions of the record, but also by the determined effort of its author to place the evidence in the light most unfavorable to the petitioner. We note the statement that the train when it left at 10:50 A. M. contained twelve cars "and only PTX-4741 was interstate" (R. 84). We might inquire just how many cars it should require to make a train really and genuinely interstate.

The opinion below is calculated to convey the impression

that petitioner predicated his case on the argument that PTX-4741 "was moving from a point in Illinois to one in Arkansas" (R. 83). This is just another misstatement. Excerpts from petitioner's brief in the Supreme Court will demonstrate that he contended that it made no difference whether the car came from Illinois on its way to Arkansas or whether it originated in Missouri on its way to Arkansas (R. 78, 79). The opinion states that "there was some evidence to show that the PTX-4741 car started in Missouri instead of Illinois" (R. 83). The opinion further states that one witness testified the cars came from St. Genevieve, Missouri (R. 83, 84). Both statements are false. Conductor Maddock testified, "This is a list of the cars that came over from the M. & I. and which were brought in by train 93, that is, the M. & I. that comes into St. Genevieve from Illinois" (R. 25, 26).

CONCLUSION

In the *Behrens* case, 233 U. S. 473, this Court said it entertained no doubt of the power of Congress to include employes whose work, isolatedly considered, was intrastate. In defiance of this decision the *Thomson* case, 380 Ill. 386, 44 N. E. (2d) 19, held the amendment unconstitutional. In the *Hancock* case, 253 U. S. 284, this Court held that where the facts are undisputed interstate commerce is a question of law. The court below held it was a jury issue. This Court has repeatedly held that, "Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states." *Brady vs. Southern Ry. Co.*, 320 U. S. 476; 2 *Roberts' Federal Liabilities of Carriers*, 2d Ed., Section 821.

The court below ignored numerous federal decisions directly in point on the facts, even those discussed in the opinion of the Appellate Court, 320 Ill. App. 406, 51 N. E. (2d)

334, including the decision of the Circuit Court of Appeals of its own circuit in *Edwards vs. B. & O. R. Co.*, 131 F. (2d) 366.

We have heretofore established that the court below misrepresented the record. Under such circumstances our duty to our client impels us to challenge the *bona fides* of its decision.

The outcome of this case is a tragedy to the petitioner. Its future use by the claim departments of railroad companies like the one here involved which (with associated companies and with offices from New York to California) form transcontinental systems, will be a tragedy to unfortunate victims of railroad accidents. Its anachronistic implications will be used to stiffen and encourage the opposition of railroad companies to the efforts of the National Railroad Retirement Board to obtain a national compensation act. It will be used for the purpose of avoiding responsibilities of federal legislation imposed upon carriers by the F. E. L. A., the Boiler Inspection Act and the Safety Appliance Acts at a time when the employes of drug stores and grocery stores are being brought under the influence of the commerce power of Congress because their activities closely and directly affect interstate transportation.

Perhaps judicial action cannot be entirely controlled by its results but it need not be blind to those results.

Respectfully submitted,

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APPENDIX

45 U. S. C. A. 51.

"Sec. 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 1, 1939, c. 685, Sec. 1, 53 Stat. 1404."

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1944.

HARRY M. AVANCE,
Petitioner,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, a Corporation,
Respondent.

No. 324.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

and

BRIEF IN SUPPORT THEREOF.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1944.

HARRY M. AVANCE, Petitioner, vs. GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, a Corporation, Respondent.	No. 324.

ANSWER TO PETITION FOR WRIT OF CERTIORARI and BRIEF IN SUPPORT THEREOF.

May It Please the Court:

Answering the petition of Harry M. Avance, the respondent Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a corporation, respectfully shows to this Honorable Court:

THE JUDGMENT OF WHICH REVIEW IS SOUGHT.

In its opinion, the Supreme Court of Illinois concludes that the judgments of the Appellate Court and Circuit Court of St. Clair County should "be reversed and said cause remanded to the Circuit Court for a new trial" (R. 87). The formal judgment of the Supreme Court of Illinois is that "the judgments of the Appellate Court, Fourth District, and of the Circuit Court of St. Clair

County in this behalf rendered, be reversed, annulled, set aside and wholly for nothing esteemed, and this cause be remanded to the Circuit Court of St. Clair County for such other and further proceedings as to law and justice shall appertain in accordance with the views expressed in the opinion of the court, a copy of which it attached hereto" (R. 87).

The Supreme Court of Illinois, by its judgment, has not terminated the litigation between the parties on the merits of the case. On remandment, the Illinois practice permits the pleadings to be amended or restated. Depositions may be taken. The retrial directed is a trial de novo at which either party may introduce any competent evidence, and the jury may return any lawful verdict. The new trial proceeds just as if there had never been a prior trial.

Illustrative of the Illinois procedure on the reversal and remandment of a case for a new trial are:

Illinois State Trust Company v. St. Louis, Iron Mountain and Southern Railway Company, 217 Ill. 504, where the rule is stated:

> "The judgment entered in this court was, that the judgment entered in the country court on the former hearing should be reversed and that the cause should be remanded. The remanding order was without any specific directions—that is, was general. The effect of that judgment was to entirely abrogate the former judgment of the county court and to remand the cause to the county court for further proceedings precisely as if no trial had ever occurred, and on a rehearing to authorize either party to introduce testimony in the same manner as if the case had never before been tried, save that no proceedings should be had or taken inconsistent with the legal principles announced in the opinion rendered by this court." Op. 506-7.

Rigdon v. Moore, 242 Ill. 256, op. 257-8, wherein the court held that on a retrial of the case, the parties were relieved of a jury waiver and of stipulations of fact entered into on the original trial.

Petitioner's concern (Pet. p. 7) lest on retrial it be held there has been an adjudication of the commerce character of his employment is groundless. The cases he cites involve questions of law.

> "If specific directions are not given, it must be determined from the nature of the case what further proceedings are proper, and it is the duty of the court to which the cause is remanded to examine the opinion and proceed in conformity with it. (People v. Waite, 243 Ill. 156; Union Nat. Bank v. Hines, 187 id. 109.) In an action at law this court has no power to determine the facts on an issue of which the parties are entitled to a trial by a jury, and therefore, upon the remandment of an action at law for a new trial, the views expressed in the opinion in regard to the facts are not binding." Op. 217.
>
> P. C. C. and St. Louis Railway Company v. Gage, 286 Ill. 213, op. 217;
> See also C. B. & Q. Railroad Company v. Lee, Admx., 87 Ill. 454, op. 461.

In no sense does the judgment of the Supreme Court of Illinois finally determine the rights of the litigants on the merits of the case.

THE JURISDICTION OF THIS COURT.

Petitioner asks that the judgment in question be reviewed under Sec. 237(b) of the Judicial Code as amended by the Act of February 13, 1925.

The statute makes it competent for the court by certiorari to require that there be certified to it for review

and determination "any cause wherein a final judgment * * * has been rendered or passed by the highest courts of a state."

The words "final judgment" have been in this and its comparable sections since the adoption of the Judiciary Act of 1789.

This court has from the beginning uniformly held that a judgment by the highest court of a state reversing the judgment of a subordinate court and remanding the case for a new trial is not final judgment within this Act of Congress.

The many cases on the point are collected in the brief supporting this answer.

Illustrative, however, of the principle is the case of Bostwick v. Brinkerhoff, 106 U. S. 3, wherein in the year 1882 it was stated:

> "The rule is well settled and of long standing that a judgment or decree, to be final, within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.
>
> "It has not always been easy to decide when decrees in equity are final within this rule, and there may be some apparent conflict in the cases on that subject, but in the common law courts the question has never been a difficult one. If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently, it has been uniformly held that a judgment of reversal, with leave for further proceedings in the court below, cannot be brought here on writ of error." Op. 9-10.

The cases relied on by petitioner do not depart from the first, the century old, the frequently and consistently fol-

lowed definition of finality. He takes excerpts from and makes facile exposition of those cases where most properly the court held it would look beyond the bare form of the judgment and see if, in substance, there was a judgment which within the definition, was final.

The situation here involved does not approach that considered in Clark v. Willard, 292 U. S. 112, where the Montana decree confirmed an execution, the enforcement of which would override the petitioner's title. The judgment as between petitioner and respondent was properly held to be final within the definition for which we contend, this court stating:

> "Further judicial proceedings may be necessary between the liquidator and others not before us. As between the liquidator and the respondents claiming as judgment creditors the suit is at an end. They came into court pro interesse suo with a petition to establish the priority of their judgment. The petition has been granted and priority decreed. Not only that, but an order vacating the execution has been reversed, and the levy reinstated. So far as these respondents are concerned, there is nothing more to be decided." Op. 118.

The doctrine of Haseltine v. Bank, 183 U. S. 130, was not abandoned. This court properly said that the opinion should be considered in interpreting the effect of the judgment in determining whether the judgment sought to be reviewed is final in that it terminates the litigation between the parties who come before this court on a petition for certiorari.

An examination of Department of Banking v. Pink, 317 U. S. 264, will disclose that the excerpt of dicta quoted (Pet. p. 8) was not used in the sense petitioner seeks to give to it. There certiorari was denied on the ground that the petition was untimely. Because of the frequent occurrence of the circumstances which required the denial, the

situation was, for the information of the bar, discussed. The language quoted by petitioner was used after the court had stated:

> "This practice, which is a departure from the rule applied to cases from other states, is inconsistent with our many decisions on the nature of a final judgment under § 237 of the Judicial Code, 28 USCA, § 344, and cannot be sanctioned. See especially Chief Justice Waite's opinion in Mower v. Fletcher, 114 U. S. 127, 29 L. Ed. 117, 5 S. Ct. 799, where a state appellate court's judgment was held to be final and reviewable when it ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed." (Op. 267.)

We submit the dicta relied on by petitioner was not meant to change or even question the rule of finality.

The definition given by this court to the words "final judgment" has been adopted by the Congress; the statute, using the words having been repeatedly amended or re-enacted following their repeated definition by this court.

As permitting the review of State Court judgments by the Supreme Court of the United States, the word "final," as applied to such judgments, was first used in the 25th Section of the Judiciary Act of 1789.

As since interpreted and applied by the court, the words have meant a judgment by which specific relief has been awarded or denied and nothing remained (ministerial acts excepted) to be done other than to execute the judgment.

Since 1789 the statute has many times been modified and re-enacted, the same words "final judgment" being used. The last of these re-enactments was in 1925 (Feb. 13, 1925, c. 229, p. 1, 43 Stat. 937). Presumably and without any reasonable doubt the Congress knew of the judicial defini-

tion of the word "final" as applied to reviewable judgments of State Courts, as announced by the decisions of this Court over the course of more than a century.

This Court has repeatedly and consistently held that by the statutory reuse of words, which have previously been defined and applied by the court, the Congress intended to and did use and adopt the words in the sense they had been used and with the meaning which had been given them by the opinions of this court written prior to such re-enactments.

In Bruce v. Tobin, 245 U. S. 18, this court held a judgment of the Supreme Court of South Dakota was not final. This judgment set aside the action of the trial court rejecting a claim asserted under the Federal Employers' Liability Act, and, without fixing the amount of recovery, directed a new trial. Discussing the point it was said:

> "It may be indeed said that although the case was remanded by the court below for a new trial, the action of the court was in a sense final, because it determined the ultimate right of the father to recover and the general principles by which that right was to be measured. But that contention is not open, as it was settled under § 709, Rev. Stat., § 237, Judicial Code, that the finality contemplated was to be determined by the face of the record and the formal character of the judgment rendered—a principle which excluded all conception of finality for the purpose of review in a judgment like that below rendered. Haseltine v. Central Nat. Bank, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; Schlosser v. Hemphill, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654; Louisiana Nav. Co. v. Oyster Commission, 226 U. S. 99, 57 L. Ed. 138, 33 Sup. Ct. Rep. 78; Coe v. Armour Fertilizer Works, 237 U. S. 413, 418, 419, 59 L. Ed. 1027, 1029, 1030, 35 Sup. Ct. Rep. 625. The re-enactment of the requirement of finality in the Act of 1916 was, in the nature of things, an adoption of the construction on the subject which had prevailed for so long a time." Op. 19.

In Latimer v. United States, 223 U. S. 501, the rule is stated as:

> "The words, having received such a construction under the act of 1883, must be given the same meaning when used in the tariff act of 1897, on the theory that, in using the phrase in the later statute, Congress adopted the construction already given it by this court." Op. 504.

See, also:

Hecht v. Malley, 265 U. S. 144, Op. 153.

The opinion and judgment of the Supreme Court of Illinois are consistent, fair and supported by the record.

Petitioner has serious misunderstandings concerning the record, otherwise he would not have charged that

> "The Supreme Court concealed vital and determinative facts not in dispute and misrepresented the contents of the record, particularly the sworn admissions of respondent, with reference to the only bona fide issue in the case" (Pet. p. 5);

or intimated that the Supreme Court of Illinois has "misrepresented the facts to defeat the operation of a federal statute" (Pet. p. 9); or stated that the

> "Unjudicial attitude of the court is manifested not only by the omissions and distortions of the record, but also by the determined effort of its author to place the evidence in the light most unfavorable to the petitioner" (Pet. p. 26); or

With reference to two comments in the court's opinion he would not have said "Both statements are false" (Pet. p. 27); and concluded:

> "We have heretofore established that the court below misrepresented the record. Under such circumstances our duty to our client impels us to challenge the bona fides of its decision" (Pet. p. 28).

With petitioner's conclusions, both as to the bona fides of the Supreme Court of Illinois, and the inferences, petitioner draws from the record, we completely disagree.

Because of these scurrilous and serious charges we have in the brief attached detailed the testimony concerning the disputed points as the record shows them and assert there is nothing to support the view that the Supreme Court of Illinois has not acted in good faith and without ample support in the record.

Petitioner forgets that although evidence may not be disputed, often several different and conflicting inferences may with equal fairness be drawn from it and what inference is to be drawn is a question for the jury.

Illustrative of this principle is the case of Plodzien v. Segool, 314 Ill. App. 40. There the court, considering a situation where different inferences could be drawn from the facts testified to, and said:

> "It is also the law that where, in such a situation, uncertainty arises as to the inferences that may legitimately be drawn from the evidence so that fair-minded men may honestly draw different conclusions, the question is not one of law but one of fact to be settled by the jury" (Op. 42-43).

In Chicago & Northwestern R. R. v. Hansen, 166 Ill. 623, the rule was stated as:

> "Where the facts are such that reasonable men of fair intelligence may draw different conclusions, the question of negligence must be submitted to the jury; but if the court can say that but one reasonable inference can be drawn from the facts, the court should act accordingly" (Op. 629).

By "the facts" the court could only have meant the undisputed evidence.

In Offcut v. Columbian Exposition, 175 Ill. 472, the trial court had directed a verdict. In reviewing the judgment the court said:

> "The province of the jury must not be invaded, and where reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions the evidence must be submitted to the jury" (Op. 476).

In reviewing the so-called facts, petitioner assumes many which the record does not support and resolves all inferences in his favor.

His treatment of the "facts," the so-called "Sworn admissions," car PTX 4741, and the opinion of the Supreme Court of Illinois, are completely partisan and, we believe, not supported by the record. These we deal with in the brief in the support of this answer.

Petitioner forgets that he, having requested and secured a directed verdict on the contested commerce questions, that the testimony on the point must be considered in the light most favorable to respondent and all reasonable inferences are to be drawn in respondent's favor. Petitioner treats the case as if all doubts were to be resolved in his favor.

Typical of petitioner's straining of facts and attitude towards the court below is the first paragraph beginning on page 24 of his brief wherein he says:

> "Strange, indeed, is the assumption by the court that PTX 4741 'left St. Genevieve, Missouri, to Texarkana, Arkansas * * *' (R. 84). It is far more reasonable to assume that PTX 4741 came from Illinois, but whether it did or not, the movement to Arkansas is interstate all the way."

What the Supreme Court of Illinois (at R. 84) said was:

> "It was not on the switching list at the Bismarck yards when the train was made up, and left at 10:50

a. m., but more than an hour after the accident, it was in a train on which plaintiff worked, billed to Texarkana, Arkansas. If it was billed when it left Ste. Genevieve, Missouri, to Texarkana, Arkansas (fol. 118), it could be inferred it was in interstate commerce. If it came into the Bismarck yards unbilled and it was designated and started in interstate commerce after the plaintiff's injury, there could be a serious question whether the moving of this car was connected with interstate commerce. The billing or destination of the other cars in the switching movement coming from Ste. Genevieve does not appear, nor did they go out on the train after it was made up. When the train on which plaintiff regularly worked left Bismarck at 10:50 A. M. it contained twelve cars, and only PTX 4741 was interstate. The admission of defendant applies to the interstate movements of the train in question during the entire day of January 17, 1942, which does not necessarily admit such movements occurred at or prior to the time of plaintiff's accident" (R. 84).

Re: Thomson v. Industrial Commission, 380 Ill. 386. In its opinion the Supreme Court of Illinois does not once mention the case of Thomson v. Industrial Commission, 380 Ill. 386, certiorari denied 318 U. S. 755-6. Neither does the Supreme Court refer to or hold the 1939 amendment to the Federal Employers Liability Act to be unconstitutional.

The Supreme Court of Illinois holds only that under the Illinois practice the commerce character of petitioner's employment was a question for the jury and that the Circuit Court erred in giving the peremptory instruction requested by petitioner, which foreclosed the jury from considering the question.

In his statement of "Reasons Relied on for Allowance of Writ" (Pet. p. 11), petitioner seems principally to seek a review of the judgment (which this court has already refused to take) in the Thomson case.

In this case no question is involved or was considered pertaining to the constitutionality of the 1939 amendment.

But the petitioner having pleaded that at the time of his accidental injury he was "working as a freight brakeman, assisting in the switching of certain cars and participating in the furtherance of the movement of interstate commerce" (R. 2), and respondent having denied the averment (R. 6), it was in effect held that on the record and under the Illinois practice the question should have been submitted to the jury.

The burden of proving the averments rested on petitioner. Day v. C. & N. W. Ry., 354 Ill. 469.

Under the Illinois practice, where the record is silent as to the commerce character of railroad cars, the presumption is that they were of an intrastate character. Chicago, R. I. & P. R. R. Co. v. Industrial Board, 273 Ill. 528, Op. 532.

REASONS RELIED ON FOR DENIAL OF WRIT.

I. The judgment sought to be reviewed is not a "final judgment" within section 237 of the Judicial Code, Title 28, U. S. C. A., par. 344 (b), and this court has authority to review by certiorari only a "final judgment" of the Supreme Court of Illinois.

The effect of the judgment sought to be reviewed is to reverse and remand for a new trial (R. 88) a judgment of the Circuit Court of St. Clair County where a trial de novo will be had. Such a judgment is not "final" as the word is used in the statute, and as it has been interpreted and applied since the enactment of the Judiciary Act of 1789; as

It does not terminate the litigation between the parties on the merits of the case. Bostwick v. Brinkerhoff, 106 U. S. 3.

A judgment by a court of appeals, reversing and remanding the judgment of the trial court for further proceedings, is not final. Haseltine v. Continental National Bank, 183 U. S. 132.

The judgment of a state court is not final, so as to permit its review on certiorari from the Supreme Court of the United States, unless the judgment is such that on denial of certiorari nothing would remain to be done except to execute the state court judgment. Lodge v. Twell, 135 U. S. 232.

II. As permitting the review of state court judgments by the Supreme Court of the United States, the word "final," as applied to such judgments, was first used in the 25th section of the Judiciary Act of 1789.

As since interpreted and applied by the courts, the word has meant a judgment by which the plaintiff was awarded specific relief and nothing remained (ministerial acts excepted) to be done other than to execute the judgment; or where the defendant had been unequivocally denied such relief.

Since 1789 the statute has many times been modified and re-enacted, the same word "final" being used. The last of these re-enactments was in 1925 (Feb. 13, 1925, c. 229, P. 1, 43 Stat. 937). Presumably and without any reasonable doubt the Congress knew of the judicial definition of the word "final" as applied to reviewable judgments of state courts, as announced by the decision of this court over the course of more than a century.

This court has repeatedly and consistently held that by the statutory reuse of a word, which has previously been defined and applied by the court, the Congress intended to and did use and adopt the word in the sense it had been used and with the meaning which had been given it by the opinions of this court written prior to such re-enactments. Hecht v. Malley, 265 U. S. 144, op. 153.

III. Under the Illinois Practice Act, one of the material averments of petitioner's complaint was that "plaintiff and defendant, and each and both of them were, at the happening of the occurrence herein pleaded, engaged in interstate commerce and in furthering and actively participating in furtherance of the movement of interstate transportation" (R. 2). The burden was on the plaintiff to prove such averment. Day v. C. & N. W. Ry., 354 Ill. 469.

Where the record is silent as to the commerce character of railroad cars, in Illinois courts the presumption is that they were of intrastate character.

C. R. I. & P. R. R. v. Industrial Board, 273 Ill. 528, Op. 532.

Wherefore, the respondent respectfully suggests that the writ of certiorari prayed for by petitioner in this cause should be denied and that the petition should be dismissed.

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RESPONDENT'S BRIEF IN SUPPORT OF ANSWER.

Because the charges which Petitioner makes concerning the good faith of the Supreme Court of Illinois, his treatment Car PTX 4741 and of the admissions filed by Respondent and the unwarranted inferences which he draws from the record, we burden the court with a complete review, particularly of the controverted matters.

THE EVIDENCE.

Petitioner was 22 years old on January 18, 1942. He had the benefit of an eleventh grade education in school. Before entering respondent's employ he had worked at various jobs, including that of a laborer, earning $10.00 to $20.00 per week, at Camp Robinson, Arkansas, and milk wagon driver earning $85.00 per month at Little Rock. In May, 1940, he married (R. 12). His father, Gus Avance, had been employed by the respondent since 1907 and was employed by respondent at the time of the trial (R. 51). His father-in-law, W. C. Robertson, had been employed by respondent for about twenty-five years, and at the time of the trial had been recently promoted and was still employed by it. He was the fireman of the crew with which petitioner was working at the time of the accident (R. 39).

Having made application and about twelve student trips for instruction, petitioner on May 28, 1941, started work for respondent as a brakeman operating out of Poplar Bluff, Missouri (R. 12).

On January 16, 1942, petitioner was assigned to make the freight run from Poplar Bluff, Missouri, to Bismarck, Missouri, about 75 miles, and return. On it the crew left Poplar Bluff in the morning, reaching Bismarck between 2 and 3 p. m. The return trip was to be made the next day (R. 12-13).

The crew's work was to switch the yard at Bismarck (R. 14), make the M. & I. (Missouri-Illinois) delivery (R. 20), and make up their train to be hauled to Poplar Bluff (R. 39-40) (R. 30).

The M. & I. delivery of twenty to thirty cars was completed about 9 a. m. and, as the crew thereafter proceeded with its work, petitioner's accident occurred. In the yards a track known as the lead track ran in a northerly-southerly direction. The coal chute track branched off of the lead track (see Pl. Ex. 1, R. 62). As its name indicated, the coal chute track was used to supply the coal chute with coal, and standing on it at a point northwardly from its junction with the lead track were, in order, two loaded coal cars and then three empty coal cars. It was desired to remove the three empty coal cars so that they could be put over in the yards (R. 30), and then spot the loaded cars on the coal chute track. At the time the engine was headed south and was just south of the coal chute switch. It had hold of two box cars and a tank car which it had brought back from the M. & I. connection. It backed these cars into the coal chute track, coupled onto the two loaded coal cars and proceeded backwards until it had coupled onto the three empty coal cars. Then it returned southwardly off of the coal chute track, past the switch, and drew the entire cut of cars onto the lead track (R. 39-40).

The next move was to shove the entire cut northwardly so that the three empty coal cars would be in the clear of the switch point. It was during this movement that the accident occurred.

THE ADMISSIONS.

In apt time petitioner moved that respondent produce a large number of documents, among other things, including "all bills of lading, documents and reports of every

nature and description," etc., covering all cars handled by respondent's train crew on day of the accident (R. 4-5).

As the bills of lading go to destination with the cars and many of the records are not kept at the Bismarck yard, petitioner's request manifestly could not be complied with without great effort and time. On November 6, 1942, the court allowed petitioner's motion ordering respondent to comply within fifteen days (R. 9). On November 20, 1942, respondent filed the admissions (R. 29) which petitioner now assails.

Apparently petitioner was then satisfied with the respondent's admissions as being a satisfactory compliance with the order, for the parties were in court on November 25, 1942 and December 4, 1942, on other motions (R. 9) and on neither occasion was the now alleged failure of respondent to comply brought to the court's attention.

In this connection Rule 17 (10) of the Illinois Rules of Practice, 370 Ill. 24, provides that an order to produce entered thereunder shall operate to stay all proceedings until complied with or vacated. Clearly nothing could be done by respondent in the cause until he had satisfied petitioner.

By the time the case went to trial, respondent had secured a portion of the documents and at petitioner's request made them available to him. At Record page 24, petitioner's counsel refers to the wheel report which we "gave" him. Also on the same record page, petitioner's counsel asked that the record show Petitioner's Exhibit 6 "was given us by counsel" for the respondent, and we referred to "all papers" having been "voluntarily" furnished by us.

To comply with the order of the court would have put the respondent to great labor, trouble, expense and substantial time must necessarily have been used to collect the documents.

The petitioner was satisfied with the admissions. He accepted the admissions as a compliance with the order.

Not once during the trial did petitioner suggest there should have been a further compliance.

The situation is not one where he has been mistreated and is not within the cases referred to by petitioner.

CAR P.T.X. 4741.

In his petition (page 16), petitioner says "Train Number 93 entered the State of Missouri from the State of Illinois at Ste. Genevieve"; and, in his typewritten jurisdictional statement (page 3), petitioner says: "It was admitted that P.T.X. 4741 was then being hauled and moved and switched on its journey to Arkansas"; and charging that the Supreme Court of Illinois "misrepresented the history of P.T.X. 4741 and its billing" (Jurisdictional Statement, p. 11).

We say the court correctly understood and stated (R. 83-4) the facts in connection with this car.

Car P.T.X. 4741 was delivered to respondent at Bismarck, Missouri, by Train 93 of the Missouri-Illinois Railroad Company. In the courts below, petitioner contended the Missouri-Illinois Train 93 with car P.T.X. 4741 had come from Illinois into Missouri and the Appellate Court so stated. (See 320 Ill. App. 406, p. 413.) Such we suggest is not the fact and certainly the jury might have found differently, for Conductor Maddox testified:

> "Q. What is train No. 93? A. That is the M. & I. train that comes in from Ste. Genevieve.
> Q. It comes in from the State of Illinois? A. From Ste. Genevieve, Missouri" (R. 25).

Conductor Maddox testified Train 93 came from Ste. Genevieve, Missouri, to Bismarck, Missouri. Neither he nor anyone else testified this train originated in Illinois. Neither did he nor anyone else testify as to where any of the cars, including Car P. T. X. 4741, originated. They

might have originated at Ste. Genevieve or from any point in Missouri between Ste. Genevieve and Bismarck.

Rule 38 (1) of this Court states that petitioners for writs of certiorari shall here file a certified transcript of the record in the case. At the time we filed our typewritten answer to the Petitioner's typed jurisdictional statement, we did not know it had become the practice to treat, as a compliance with the rule, the filing of a certified copy of the printed abstract of the record in the court below.

In the Supreme Court of Illinois the controversy raged as to whether Train 93 "entered the State of Missouri from the State of Illinois at Ste. Genevieve, Missouri" (p. 16). The Petitioner there so charged (see certified copy of excerpt from his brief in the Supreme Court of Illinois, filed by us in this cause) and cited abstract pages 34, 34a, in support of his assertion. This Respondent had denied in his brief (see filed certified copy of excerpts from his brief in the Supreme Court of Illinois), and we referred to the pertinent pages of the record of the Circuit Court on file with the Supreme Court of Illinois. Pages 115 to 121, inclusive, of the transcript of the record in the Supreme Court of Illinois have also been certified. They cover pages 34 and 34a of the abstract of the record appearing at printed record page 25.

An examination of the matters so certified will disclose there is not the slightest shred of evidence therein which would permit and certainly none which would require a jury to conclude that Train No. 93 or any of the cars which it brought into Bismarck originated in Illinois; and this part of the record was specifically brought to the attention of the Supreme Court of Illinois.

References to the Rules of the Appellate and Supreme Courts of Illinois concerning the records of the trial court required to be filed are printed as an appendix to this brief.

Concerning car P. T. X. 4741 (an empty tank car) we

have urged and still urge that there is no evidence it had come into Missouri from Illinois, or was, at 9:15 a. m., January 17, 1942 (Complaint, Rec. 2), the time of the accident, then billed or assigned to any point outside of Missouri. It is true car P. T. X. 4741 at 10:50 a. m. on said date (Rec. 65, Petitioner's Exhibit F, cont'd) left Bismarck, Missouri, with the train of which petitioner would, but for the accident, have been a crew member, assigned to a point in Arkansas; yet the time when it was so assigned or billed does not appear in the evidence.

In his Jurisdictional Statement (pp. 2-3) petitioner says that at the time of the accident the engine was attached to and hauling P. T. X. 4741, "which was being taken from the other railroad company to be placed in the train and which left Bismarck approximately one hour after the accident, consigned to Texarkana, Arkansas." This is solely his conclusion from the evidence, which, most favorably considered for him, did no more than raise a jury question on the point. There is no evidence in the record as to time, prior to the departure of the train, when Car P. T. X. 4741 was assigned or billed or designated to travel from Bismarck, Missouri, to Texarkana. In peremptorily instructing the jury on the point, the trial court was not warranted in concluding such assignment occurred prior to the accident, even though a jury would have been warranted in drawing such a conclusion.

Petitioner is in error when he states (p. 15) that admittedly some of the cars switched prior to the accident were interstate. The stipulation does not, with reference to the happening of the accident, fix the time of the switching. Referring to car P.T.X. 4741, petitioner states, "At the time of the accident this interstate car was being hauled and moved by the engine" (p. 15). There is nothing in the record to indicate the car was doing anything other than drifting without specific assignment until over an

hour after the accident when it left Bismarck consigned to Arkansas. When it was so assigned does not appear in the record.

Petitioner's assumption that the Missouri and Illinois delivery had not been completed before the time of the accident is also unwarranted, as the testimony was that the crew had already returned to the Missouri Pacific yards and were engaged in a new task of setting out empty coal cars from the coal chute track (R. 15, 30 and 40).

On page 15 of his printed petition petitioner asserts that between 7 and 9 o'clock the crew "had placed a number of cars in their train on track 7 before the accident occurred" and "admittedly some of these cars were interstate." The statement that some of these cars were interstate is not borne out by the record. Car P.T.X. 4741 was the only interstate car which went out with respondent's train (R. 25, 65) and, as heretofore pointed out, there is no evidence as to when it was assigned or billed or designated as a part of that train. The "admissions" did not differentiate between cars handled before and after the accident.

We suggest therefore there is no fair basis for questioning the correctness of the description of the facts by the Supreme Court of Illinois or the bona fides of its decision.

II.

Concerning the Finality of a Judgment Within the Meaning of Sec. 237 (b) of the Judicial Code.

This Court has uniformly held that a judgment of the highest State Court reversing a case and remanding it for a new trial is not a final judgment.

Houston v. Moore, 16 U. S. 433, 434;
Brown v. Bank, 4 Howard 465, 466;
Tracy v. Holcombe, 24 Howard 426;
Johnson v. Keith, 117 U. S. 199;
Bruce v. Tobin, 245 U. S. 18, 20.

Where a State Court of last resort reverses and remands a case for further proceedings the judgment is not final.

Winn v. Jackson, 25 U. S. 135;
St. Clair County v. Lovingston, 18 Wallace 628, 629;
Parcels v. Johnson, 20 Wallace 653;
Zeller v. Switzer, 91 U. S. 487;
Davis v. Crouch, 94 U. S. 514;
Rice v. Sanger, 144 U. S. 197;
Haseltine v. Bank, 183 U. S. 130, 132.

Where the question before the State Court was on the pleadings, a judgment reversing and remanding the case was not considered final for the reason that the pleadings could be amended and an entirely different case presented on a second appeal.

Meagher v. Minnesota T. M. Co., 145 U. S. 608, 611;
Clark v. Kansas City, 172 U. S. 334, 337;
Missouri and K. I. R. Co. v. Olathe, 222 U. S. 185, 186;
McComb v. Commissioners, 91 U. S. 1;
Schlosser v. Hemphill, 198 U. S. 173, 175;
Bostwick v. Brinkerhoff, 106 U. S. 3;
Louisiana Nav. Co. v. Oyster Comm., 226 U. S. 99, 101;
Great West. Telegraph Co. v. Burnham, 162 U. S. 339, 342.

A similar rule has been followed in equity cases where the Court of last resort has reversed the decree of the lower Court and remanded for a new trial.

Pepper v. Dunlap, 5 Howard 51;
Moore v. Robbins, 18 Wallace 588.

The judgment or decree, to be final, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance by the United States Supreme Court, the Court below would have nothing to do but to execute the judgment or decree it had already rendered.

Bostwick v. Brinkerhoff, 106 U. S. 3, 4;
Mower v. Fletcher, 114 U. S. 127, 128.

Where by the judgment of the reviewing Court, the rights of the parties are decided and the lower Court is directed to perform some ministerial act which will terminate the litigation, then such a judgment is final.

Board of Commissioners v. Lucas, 93 U. S. 108;
Mower v. Fletcher, 114 U. S. 127, 128;
North Carolina R. Co. v. Story, 268 U. S. 288, 297;
Rio Grande Western R. Co. v. Stringham, 239 U. S. 44, 47;
Department v. Pink, 317 U. S. 264, 267.

Similarly it has been held that a judgment that a party was entitled to condemn certain lands, but remanding the cause for assessment of damage and compensation was not a final judgment for purposes of a writ of error.

State of Washington v. Superior Court, 243 U. S. 251, 257.

Or where the judgment of the State Court has definitely fixed rights and liabilities, but has remanded the case to the trial court to fix the amount of the recovery.

Bruce v. Tobin, 245 U. S. 18, 19.

The foregoing decisions clearly demonstrate the settled law in this Court. Judgments are not final so long as some judicial, as distinguished from a merely ministerial, act remains to be done in the State Courts.

Petitioner contends that, for practical purposes, this judgment is final and argues that under the rule of stare decisis said to obtain in Illinois, the Courts of that State are forever precluded from considering whether petitioner is under the F. E. L. A. as a matter of law.

But quite apart from the foregoing considerations, this Court, in testing a judgment for finality, is not guided by nor conceived with any limitations of appellate review imposed by State Courts on themselves, i. e.:

> "Nor is it material that the State Supreme Court regarded itself as bound by the decision in the former appeal as the law of the case and declined, in the judgment now under review, to again consider the question. The judgment under review was the only final judgment in the appellate court of the state from which plaintiff in error could prosecute a writ of error, and, until such final judgment, the case could not have been brought here for review. Schlosser v. Hemphill, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654, and cases therein cited."
>
> Chesapeake and Ohio Railway Company v. McCabe, 213 U. S. 207, 214.

More recently this Court has said:

> "We are not unmindful of the ruling of the appellate court to the effect that the issues were, in fact, disposed of on the first writ of error, and its powers brought to an end; but, whatever may be the view of that court in respect of its own power to again consider the issues, the judgment now under review

is the only one this court can consider as final, for the purpose of exercising its appellate jurisdiction."

Georgia Railway & Power Co. v. Decatur, 262 U. S. 432, 438.

See, also:

Great Western Telegraph Co. v. Burnham, 162 U. S. 339, 345.

By a facile exposition of decisions of this Court, Petitioner has sought to evolve a rule which will give special consideration to the "special circumstances of this particular case" (Petition and Brief p. 6). To do so he first challenges the integrity of the Supreme Court of Illinois and then puts an interpretation on the language of opinions of this Court which they will not bear.

For example, Clark v. Williard, 292 U. S. 112, does not abandon the rule of Haseltine v. Bank, 183 U. S. 112. The rule simply is that where the judgment of the State Court, as here, refers to the Court's opinion, this Court may consider the opinion as a part of the "face of the record" as that term has been used. In the Clark case the requisite finality had been reached as to the cause under consideration there.

Department v. Pink, 317 U. S. 264, is cited. The quoted portion of the opinion (Brief p. 8, 317 U. S. 268) says in effect that the record of the State Court will be examined, and if, under the state law, it is found the litigation was ended between the parties and there could be no further review, then the judgment will be regarded as final. It is apparent that the judgment there being considered was final, but the petitioner had failed to petition for certiorari within the three-month limitation. There is nothing decided in the Pink case which overrules or even questions the long line of cases defining a final judgment, nor which in any way limits the doctrine as first announced and consistently followed by this Court.

The cases cited in the Answer demonstrated that when, in 1925 (as it had done many times before), Congress re-enacted the Judicial Code and in Sec. 237 (b) used the words "final judgment" as being the judgments of state courts here subject to review on certiorari, the Congress used the words with the interpretation, application and meaning which this Court in numerous unquestioned decisions extending over one hundred years had given to them. In substance, petitioner's argument is that Congress should change the law.

We respectfully submit he is entitled to no relief under the law or on the merits of his petition.

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APPENDIX.

References to Rules of Appellate and Supreme Courts of Illinois concerning character of Records required to be filed.

Under the Illinois practice, when Respondent took the case to the Appellate Court of Illinois, he was required to and did, on April 16, 1943, file (R. 76) in that court a complete transcript of all the testimony and other evidence in the case (Appellate Court Rule 1, 294 Ill. App. XIII). The rules of that Court also required an abstract of the record to be prepared and filed (Appellate Court Rule 8, 294 Ill. App. XXV). This was filed in the Appellate Court on May 5, 1943 (R. 76). The record filed by Respondent in the Appellate Court consisted of all the testimony and the rulings of the trial judge and all matters upon which such rulings were made, as prescribed by Supreme Court Rule 36 (c), 370 Ill. 38 and Appellate Court Rule 1, 294 Ill. App. XIII).

When the case went from the Appellate Court to the Supreme Court of Illinois, the complete Circuit Court record (not the abstract thereof), together with the record of the Appellate Court, was transmitted to the Supreme Court of Illinois [Supreme Court Rules 32 (1), 370 Ill. 32].

SEP 16 1944
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 324

HARRY M. AVANCE,

Petitioner,

vs.

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF

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Respondent.

PETITIONER'S REPLY BRIEF

JURISDICTION

Respondent forgets that certiorari implies discretion. The rigid concept of finality, now liberalized if not abandoned, ought to be sufficiently humanized to prevent the harsh and absurd results so strikingly presented here and which cannot be rectified by appeal. Otherwise, there is naught to prevent the state court from continuing to nullify indefinitely the 1939 amendment by the mere device of granting new trials, further obtaining impunity by the strategy here employed of ignoring the statute previously held unconstitutional.

Brevity will be served by selecting for differentiation the

leading F. E. L. A. case relied on by respondent, *Bruce vs. Tobin*, 245 U. S. 18. That case should be overruled or at least distinguished by reason of the following dissimilar points:

1. Unlike the case at bar the amount of recovery had not been specifically fixed and this Court could not end the litigation but in any event would have to order a new trial to determine damages. Here, concededly, after approval by the Appellate Court the amount of damages was not subject to further judicial review.

2. That case was based upon the Hazeltine decision, now overruled or definitely discarded, which formerly limited the inquiry to the face of the record and the formal character of the judgment entered.

3. Under the F. E. L. A. (45 U. S. C. A. 51) the damages sustained by the beneficiaries of Tobin had to be not only assessed in gross but also apportioned by the trial court. Mother and father would not be entitled to equal shares unless each sustained the same financial loss. The trier of fact had never considered this issue. Here the trier of fact has considered and decided every issue necessary, provided, however, that petitioner be entitled to F. E. L. A. protection as a matter of law.

Is there no constitutional question involved? A court which refuses to apply or discuss a statute directly applicable to the facts before it has most certainly rendered a decision against the validity, force and authority of that statute.

THE MERITS

Concerning petitioner's trips to Illinois, Tennessee and Arkansas (R. 12) respondent has maintained a discreet and significant silence. Likewise consigned to oblivion are the admissions that the crew before it "departed" switched one or more cars in interstate commerce (R. 28); that the crew "of which plaintiff was a member" did *haul, move, switch and transport at diverse intervals* one or more cars consigned in interstate commerce (R. 28); that "the crew of which plaintiff was a member did at diverse intervals deliver one or more cars to the Missouri-Illinois Railroad Company consigned in interstate commerce" (R. 29) (admittedly only one delivery was made that morning and the accident occurred while returning); and that persons outside of Missouri had ordered the delivery of one or more cars handled "by the crew of which plaintiff was a member prior to the time the train departed from Bismarck" (R. 29).

Apparently respondent's counsel believe there are judges and lawyers who are naive enough to assume that the Supreme Court of Illinois inadvertently overlooked these admissions. The Supreme Court said that "The admission of defendant applies to the interstate movements of the train in question during the entire day of January 17th, 1942, which does not necessarily admit such movements occurred at or prior to the time of plaintiff's accident" (R. 84). Only one admission of the five relates to the train itself. Note the Supreme Court employs the singular in referring to "the admission" (R. 84).

The work of preparing an interstate train is interstate commerce. At the time of the accident PTX-4741 was being taken by the engine from the Missouri-Illinois delivery to be placed in the train, and hence necessarily it must have been billed at the time. If PTX-4741 had not been billed,

then, like the empty coal cars, it would have been placed elsewhere in the yard but not in the train. Thus the court was grossly in error in its interpretation of the only admission of which it took cognizance.

The other four admissions were so entirely at variance with the purpose of the Supreme Court of Illinois to sabotage the 1939 amendment as to necessitate upon the part of both court and counsel a complete silence with reference to their existence.

The rule of the *Hancock* case, 253 U. S. 284, that where the facts are undisputed the question is one of law also obtains in the State of Illinois. *Benson vs. Chicago, R. I. & P. R. Co.*, 267 Ill. App. 11, aff'd 352 Ill. 195, 185 N. E. 244; *Pipal vs. Grand Trunk Western R. Co.*, 341 Ill. 320, 173 N. E. 372; *Gidley vs. Chicago Short Line R. Co.*, 346 Ill. 122, 178 N. E. 400; *Lavigne vs. Chicago, M., St. P. & P. R. Co.*, 287 Ill. App. 253, 4 N. E. (2d) 785; *Mitchell vs. Louisville & Nashville R. Co.*, 194 Ill. App. 77. There is no local rule of practice contrary to the universal rule in both federal and state courts on the subject and, even if there were, it could not abridge a substantive right under the F. E. L. A.

Nor is there any presumption in Illinois that the commerce was intrastate. The case of *C., R. I. & P. R. Co. vs. Industrial Board*, 273 Ill. 528, was under the Workmen's Compensation Law. It held that the burden was upon the railroad company to show the nature of the commerce, and, sustaining the award, that where plaintiff made out a *prima facie* case, the burden was upon the railroad company to show whether the cars were interstate or intrastate. The court assumed the work was intrastate because of the failure of the railroad company to show that it was interstate.

Respondent's counsel attempts to distort this decision into a general presumption in favor of the intrastate character

of the work, contrary to the express holding of this Court in *Philadelphia and R. R. Co. vs. Polk*, 256 U. S. 332, that, "The presumption, indeed, might be the other way."

Apparently respondent's counsel are willing to induce a belief in this Court that train 93 originated at St. Genevieve, Missouri. Apparently respondent's counsel are willing to permit this Court to believe that car PTX-4741 may have originated in St. Genevieve, Missouri. In the ultimate outcome it should make absolutely no difference, but for the sake of truth and accuracy we must again quote the undisputed testimony of Conductor Maddock which will be found on page 25 of the record, when he was referring to cars that his engine was hauling at the time of the accident:

> "This is a list of the cars that came over from the M. & I. and which were brought in by train 93, that is, the M. & I. that comes into St. Genevieve from Illinois. Conductor Rehm brought that train in."

This quotation is from the abstract of record prepared by respondent and filed in the Appellate and Supreme Courts of Illinois.

We reiterate our position that if PTX-4741 be completely eliminated from this picture, the general duties of Avance, as well as his work on the occasion of the accident, would not only justify but require a decision as a matter of law that he comes under the protection of the F. E. L. A. as amended in 1939. His general work was interstate. On the morning of the accident the crew had switched interstate cars and made an interstate delivery. At the very moment of the accident they were making up an interstate train.

The Supreme Court expressly stated that when the train left Bismarck, "only PTX-4741 was interstate" (R. 84). Counsel place great reliance upon the fact that only PTX-4741 was interstate. Again let us quote the testimony of Conductor Maddock, undisputed, as it appears in the record on page 25: "Leaving Bismarck that day according to the

wheel report, among the eleven cars that we had, two of them were going to Texarkana, Texas or Arkansas."

CONCLUSION

On January 3rd, 1944, this Court held that a night watchman in a veneer factory operated only in the daytime had such a close, immediate and necessary connection with the production of goods for commerce that he came within the scope of Congressional power. *Walton vs. Southern Package Corp.*, 64 S. Ct. 32. It would be impossible in any system of jurisprudence, however strange or perverse, to reconcile that decision with the one here under review.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1944.

HARRY M. AVANCE,
Petitioner,
vs.
GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, a Corporation,
Respondent.
No. 324.

MOTION BY RESPONDENT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1944.

HARRY M. AVANCE, Petitioner, vs. GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, a Corporation, Respondent.	No. 324.

MOTION BY RESPONDENT.

Motion by Respondent to Include in and Print as a Part of the Transcript of the Record in This Cause Portions of the Record of the Supreme Court of Illinois and Excerpts of Briefs of the Parties in Said Court.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, respondent, in the cause above entitled, respectfully shows to the Court:

1. Prior to the filing of the transcript of record in this Court, Harry M. Avance, the petitioner, did not serve on respondent a praecipe designating the matters to be included in said transcript of the record.

2. Said transcript of record did not include the complete transcript of the proceedings on the trial of this case which were then on file with the Clerk of the Supreme Court of Illinois, but included only the printed abstract thereof.

3. There was included in such transcript of the record, as filed in this Court, excerpts from the briefs of the parties in the Supreme Court of Illinois (R. 78-79).

4. The abstract of the record filed in the Supreme Court of Illinois certified to this court and here printed as the "Transcript of Record," at one place erroneously refers to "Train 93" as "the M & I that comes into Ste. Genevieve from Illinois" (R. 25-26). Such reference in the abstract is in error and such error is in part the basis of petitioner's claim that the Supreme Court of Illinois acted in bad faith. Petitioner quotes and places great reliance on this error. See his Petition at pages 16 and 27; and his Reply Brief at page 5. The original record does not so read, reading that the train came in "From Ste. Genevieve, Missouri." A certified copy of the typewritten pages of the erroneously abstracted testimony being a part of the record of the Supreme Court of Illinois, namely pages 115 to 121 inclusive of said record, has been certified by the Clerk of the Supreme Court of Illinois and lodged with the Clerk of this court.

5. Such error in the abstract was called to the attention of the Supreme Court of Illinois by paragraphs 2, 3 and 4 on page 20, and paragraphs 1, 2 and 3 on page 21 of the Statement, Brief and Argument filed by the respondent in the Supreme Court of Illinois. The Clerk of said court has certified and there has been lodged with the Clerk of this court, a copy of such portions of said brief. The Clerk of the Supreme Court of Illinois has also certified and there has been lodged with the Clerk

of this court lines 6 to 9 inclusive of page 22 of the Statement, Brief and Argument of petitioner here in the Supreme Court of Illinois.

6. Inasmuch as such portion of the abstract of the record filed in the Supreme Court of Illinois is in error, and such error is here in part made the basis for challenging the good faith of the Supreme Court of Illinois; and inasmuch as such error was called to the attention of that court, the transcript of the record as here printed and considered should fairly be supplemented and expanded by including therein pages 115 to 121 inclusive of the record of the Supreme Court of Illinois, and the excerpts of the briefs of the parties above referred to, filed in the Supreme Court of Illinois.

Wherefore, this respondent moves that the certified copies of that portion of the transcript of the record of the Supreme Court of Illinois and of the briefs filed in the Supreme Court of Illinois, which have hereintofore been referred to, and which are now lodged with the Clerk of this court, be included in the transcript of the record to be considered here; and that the Clerk of this court be directed, at respondent's expense, to print and attach the same to the printed transcript of the record in this cause.

GUY A. THOMPSON, Trustee,

MISSOURI PACIFIC RAILROAD COMPANY,

By JOSIAH WHITNEL,

510-17 First National Bank Building,

East St. Louis, Illinois,

Attorney.

State of Illinois, }
County of St. Clair. } ss.

Josiah Whitnel, first being duly sworn on oath, states he is counsel for the respondent in the cause above entitled, that he is familiar with the transcript of the record in this cause now on file in the Supreme Court of the State of Illinois, and with the briefs of the parties filed in that court. This affiant further states that he has read the foregoing motion and that the matters therein stated are true in substance and in fact.

Josiah Whitnel.

Subscribed and sworn to before me this 18th day of September, 1944.

Rose Mary Neal,
Notary Public.

(Notary Seal)

[fol. 89] No. 27,864

HARRY M. AVANCE, Plaintiff-Appellee,

vs.

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, Defendant-Appellant

Appeal from theAppellate Court, Fourth District. There Heard on Appeal from Circuit Court of St. Clair County.

Paragraphs 2, 3 and 4 Page 20 and Paragraphs 1, 2 and 3 Page 21 of STATEMENT, BRIEF AND ARGUMENT OF APPELLANT.

The opinion of the Appellate Court correctly states defendant's contention as to these five cars, but bases its determination of the commerce question upon three other cars which were attached to the engine at the time of the accident, viz., Mo. Pac. 3205 (the correct number is 32052), PRR 50409 and PTX 4741. As to these cars the opinion states they "were brought in from Illinois on train 93 by conductor Rehm."

The conclusion so stated has no support in the evidence and, to demonstrate this, we must necessarily refer to the record.

[fol. 90] The matter is of such consequence that in the abstract (page 34A) we have completely set out the testimony on the point. We suggest the only conclusion which can be drawn from the testimony of conductor Maddock is that the three cars were brought into the Bismarck yard by the M. & I. Railroad train No. 93, which came from Ste. Genevieve, Missouri. We ask the Court to examine abstract pages 33, 34 and 34A and record pages 115-117.

But assuming train 93 came into Ste. Genevieve, Missouri from Illinois, these three cars have no interstate character by reason thereof.

Conductor Maddock did not testify these cars came from Illinois. He did not ride train 93. There is nothing on the wheel report (Ex. 8, Abs. 91) which indicates that any one of the three cars came from Illinois. Assuming train 93 started in Illinois and entered Missouri at Ste. Genevieve, there is no evidence the three cars came in with the train from Illinois. Car M. P. 32052 was loaded with lime (see

Ex. 8, Abs. 91) when *I*t came into Bismarck, but had been unloaded when conductor Maddock handled it (Abs. 33).

There are lime quarries and cement plants at Ste. Genevieve, Missouri. Ste. Genevieve is over thirty miles from Bismarck, Missouri. There are several other stations en route from Ste. Genevieve to Bismarck.

[fol. 91] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court,ss:

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois, and keeper of the records and seal thereof, do hereby certify the foregoing to be a true copy of paragraphs 2, 3 and 4, page 20, and paragraphs 1, 2 and 3, page 21, of brief of appellant filed in this office on the 22d day of February A. D. 1944, in a certain cause entitled in this Court

No. 27864

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, a corporation, Appellant,

vs.

HARRY M. AVANCE, Appellee

Appeal from Appellate Court Fourth District

Witness: my hand and seal of said Supreme Court, in Springfield, in said State, this 23d day of August A. D. 1944.
Edward F. Cullinane, Clerk pro tempore. (Seal.)

[fol. 92] No. 27864

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, a corporation, Appellant,

vs.

HARRY M. AVANCE, Appellee

[fol. 93] Mr. Johnson: I object to that.
The Court: Objections sustained.

To which ruling of the Court counsel for the plaintiff then and there excepted.

Q. Is every other car on there except the PTX 4741, empty tank?
A. It shows ten on here.
Q. How many did you have leaving there?
A. I think the wheel report shows eleven.
Q. Do you remember you had eleven?
A. No, I don't. All I have to go by is that.

Mr. McDonald: We will offer Plaintiff's Exhibit "6" in evidence. It is one of your records. May the record show that Exhibit "6" was given us by counsel for the defendant.
Mr. Whitnel: All papers you have were furnished voluntarily by counsel.
Mr. Listeman: We renew our objection to all of these exhibits.
The Court: Objection overruled. They may be admitted.

To which ruling of the court counsel for the defendant then and there excepted.

Q. Have you a book in your pocket that you make up yourself?
A. No.
Q. You had it yesterday.
A. I have a book in which I keep my time and crew.
Q. Does that book show the cars you took out of Bismarck?
A. No, sir.
Q. Have you any book at all that shows the cars you took out of Bismarck?
A. No. We don't have to have.
Q. Do you have?
A. No, sir.

Q. Now I think you possibly might have to explain this to every one. It says "Destination Junction and Routing". With respect to PTX 4741, it has "X-491". What does that indicate?

[fol. 94] A. That is the station number.

Q. What station number is it?

A. Texarkana.

Q. What State?

A. Arkansas.

Q. So that that car was going to Arkansas, is that right?

A. That's right. That is on the wheel report and I put it down there.

Q. And what is the last station number on this trip, that is within the State of Missouri, if the stations go by number?

A. That I run to?

Q. No. When you start out of St. Louis what is that station number?

A. X-1.

Q. And the last town on the southern border of the State of Missouri, when you cross into Arkansas, what is that station number?

A. X-180. Neelyville, Missouri.

Q. So that any destination shown here that has a number higher than X-180 means it has gone beyond the State of Missouri?

A. Yes, sir.

Q. It would be in Arkansas or points south?

A. Yes.

Q. What is Station X-344?

A. Little Rock.

Q. Arkansas?

A. Yes. That is a car I picked up.

Q. And which cars are the eleven cars you left town with, the leading cars on the wheel report?

A. Yes, sir, down to here.

Q. By that you mean on page two of this exhibit, starting at the top with Missouri Pacific——

A. Page one it is.

Q. You are right. The first eleven cars on page one or the first twelve cars, which is it?

A. It will be twelve. That counts the caboose.

[fol. 95] Q. The first twelve cars on the top of page one of the exhibit are the cars you left Bismarck with?

A. Yes.

Q. Where is X-491, what station is that?
A. Texarkana.
Q. So that in leaving Bismarck this day, according to this wheel report, among the eleven cars that you had two of them were going to Texarkana, Texas or Arkansas?
A. Yes. X-344 and X-491.
Q. And this empty tank car was one of the cars involved in this particular movement at the time?

Mr. Johnson: I object, repetition.
Mr. Listeman: He wouldn't know about it.
The Court: If he knows he may answer.

To which ruling of the court counsel for the defendant then and there excepted.

Q. I will withdraw it. Calling your attention to Plaintiff's Exhibit "8" I will ask you if you can find one of the nine cars involved at the time, being Missouri Pacific 32052, empty, on this particular exhibit?
A. Yes, sir. 32052.
Q. Missouri Pacific 32052?
A. Yes, sir.
Q. And what is this a report of that was furnished us by counsel for defendant also?
A. This is the list that come in over the M. & I. from Ste. Genevieve and around in there.
Q. In other words, this car with other cars was brought in to the Missouri Pacific yard at Bismarck by train number ninety-three?
A. Missouri and Illinois Division. M. & I.
Q. Brought in by train ninety-three?
A. Yes.
Q. What is train number ninety-three?
A. That is the M. & I. train that comes in from Ste. Genevieve.
Q. It comes in from the State of Illinois?
[fol. 96] A. From Ste. Genevieve, Missouri.
Q. What conductor brought that in?
A. Rehm.
Q. Does this report show when the car 32052 was brought into Bismarck?
A. There is no date on it.
Q. Can you tell from that record when the car came in?
A. No. It is bound to come in that day.

Q. So that you would say that car came into Bismarck that day?

A. Yes, sir. Came in as part of train ninety-three.

Mr. McDonald: We will offer this exhibit "8" in evidence.

Mr. Listeman: The same objection.

The Court: It may be admitted.

To which ruling of the court counsel for the defendant then and there excepted.

Q. Calling your attention to Plaintiff's Exhibit "9", what is that a record of?

A. That is a record of the cars we delivered to the M. & I. Railroad.

Q. On the 17th of January 1942?

A. There is no date on here.

Q. That is a record we got from counsel for the defendant with reference to the cars delivered to the M. & I.

A. That is the cars we switched out of the yard and out of the Belmont Branch train, and delivered them to the M. & I.

Q. The M. & I. is the Missouri and Illinois Railroad?

A. Yes, sir.

Mr. McDonald: We offer in evidence Plaintiff's Exhibit "9".

Mr. Listeman: The same objection all the way through.

The Court: It may be admitted.

To which ruling of the court counsel for the defendant then and there excepted.

Q. Calling your attention to Plaintiff's Exhibit "10", consisting of seven tabs, with listings of cars. They were all furnished to us by the counsel for the Railroad Company, the cars in the yard that day. Will you examine them and tell us about the first exhibit. The cars in that train are [fol. 97] the cars listed on the first exhibit. How did the cars come into the yard, do you know, in a train or otherwise?

A. Sure they come in a train. Number eleven track.

Q. That shows the cars in the first section at the top that were on number eleven track?

A. Yes, sir and I think this is my train in there. Part of it is my train in there.

Q. And the second section?
A. And part of it has the branch local train in there.
Q. And where it says the next heading what is that?
A. New Ozark.
Q. What is that?
A. That is the New Ozark flooring mill.
Q. Does that show the cars on that track?
A. One car listed off the Ozark Flooring Mill. A carload of flooring for St. Louis.
Q. Number ten, what does that show?
A. Track number ten.
Q. What does it show?
A. That is track number ten. It shows a bunch of cars that come in there and one of them we had to place on the New Ozark for flooring, where we took the one out.
Q. The next heading.
A. You don't want this.
Q. I am not asking about each one. That would take too long. What about number nine? Is this number nine?
A. Yes, sir.
Q. Let me take this. This then shows the cars on track——

The Court: What exhibit is this?
Mr. McDonald: Exhibit "10".
The Court: Always refer to the exhibit.

Q. Exhibit "10" shows the cars that were on various tracks in the yard?
A. Yes, sir, nine, ten and eleven and the New Ozark.
Q. And that shows as of January 17, 1942?
A. Yes. That is part of our work.
[fol. 98] Q. The second page of Exhibit "10". It shows cars that came into Bismarck with what conductor?
A. Conductor Stall.
Q. Train number what?
A. First 63.
Q. Where did that train come from?
A. St. Louis, Missouri.
Q. That shows the cars that train brought in on January 16, 1942?
A. That is part of them. That is a few they set out as they went by Bismarck.
Q. The third sheet of Exhibit "10", it shows cars brought in by what train number?

A. 368.

Q. The conductor.

A. Shore. They went out. They didn't come in.

Q. It shows cars going out?

A. Yes. All St. Louis cars off number one track.

Q. St. Louis, Missouri?

A. Yes. 368 come from Poplar Bluff and picked up all these cars.

Q. And 368 came from Poplar Bluff with cars in the train and on arrival at Bismarck picked up these cars? 368 picked up these cars and made these cars a part of the then existing train?

A. Into St. Louis, yes, sir.

Q. The next tab of Plaintiff's Exhibit "10" is what?

A. That is two cars of Company coal set out at Bismarck.

Q. Who set it out?

A. W. A. Shore, from the first train 368.

Q. Where did that train start?

A. Poplar Bluff.

Q. And ends where?

A. St. Louis.

Q. Missouri?

A. Yes, sir.

Q. Does that show the date the cars were set out by the train?

A. No, sir.

[fol. 99] Q. The next tab of Plaintiff's Exhibit "10", what does that show?

A. That shows 92s train M. & I. going out of there. The cars had been delivered to it, going to Mosher.

Q. It shows the cars that 92 took out of Bismarck?

A. Yes. They had been delivered to them up on their tracks. This is the M. & I. train 92.

Q. Number ninety-two on January 17, 1942 shown by Plaintiff's Exhibit "10" is the M. & I. train?

A. Part of it.

Q. The next tab shows what?

A. It shows three cars of Company coal.

Q. Brought in or left there with what train?

A. Come in on third 368 from Poplar Bluff.

Q. That train stopped at Bismarck and set out those cars?

A. Yes.

Q. And the last tab of Exhibit "10", that is one of the seven, shows what?

A. Well, it shows three cars on number eleven track and one car on the house track.

Q. Does it show how these cars got to Bismarck?

A. No. These were going out of Bismarck on train 56, out of Bismarck into St. Louis. Train 56, the 17th and the train was on number eleven track and X-1 was on the house track.

Mr. McDonald: We offer Plaintiff's Exhibit "10", consisting of seven tabs, into evidence.

Mr. Listeman: Same objection.

The Court: They may be admitted.

To which ruling of the court counsel for the defendant then and there excepted.

Mr. McDonald: We have one more record that counsel has given us. Counsel, might we agree or stipulate that you have given plaintiff's counsel a report of cars on hand on January 16, 1942, as they stood in the yard at ten fifty A. M., by your record, and also a report of cars on hand as they stood on your tracks at Bismarck.

[fol. 100] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois, and keeper of the records and seal thereof, do hereby certify the foregoing to be a true copy of pages 115 to 121, inclusive, of the transcript of record filed in this office on the 16th day of April A. D. 1943, in a certain cause entitled in this Court

No. 27864

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, a Corporation, Appellant,

vs.

HARRY M. AVANCE, Appellee

Appeal from Appellate Court, Fourth District

Witness: my hand and seal of said Supreme Court, in Springfield, in said State, this 23d day of August A. D. 1944.

Edward F. Cullinane, Clerk pro tempore. Seal.)

ol. 101] No. 27864

HARRY M. AVANCE, Plaintiff-Appellee,

vs.

UY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, a Corporation, Defendant-Appellant

Appeal from the Appellate Court, Fourth District

ıere Heard on Appeal from Circuit Court of St. Clair County.

onorable Maurice V. Joyce, Judge Presiding.

Lines 6, 7, 8 and 9, Page 22 of Statement, Brief and Argument of Appellee

Their precise origin or destination does not appear but does appear that train No. 93, upon which they arrived, ıme into St. Genevieve from the state of Illinois (34, 34A).

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fol. 102] UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

I, Edward F. Cullinane, Clerk pro tempore of the Supreme Court of the State of Illinois, and keeper of the records and seal thereof, do hereby certify the foregoing to be a true copy of lines 6, 7, 8 and 9, page 22, of brief of appellee filed in this office on the 13th day of March A. D. 1944, in a certain cause entitled in this Court No. 27864, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, a corporation, Appellant, vs. Harry M. Avance, Appellee; Appeal from Appellate Court, Fourth District.

Witness my hand and seal of said Supreme Court, in Springfield, in said State, this 23d day of August A. D. 1944.

Edward F. Cullinane, Clerk pro tempore. (Seal.)

[fol. 103] [Stamp:] Received Sep. 21, 1944. Office of the Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1944

No. 324

HARRY M. AVANCE, Petitioner,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company

On Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

ACKNOWLEDGMENT OF SERVICE

Receipt is acknowledged of a copy of Motion to Include in and print as a Part of the Transcript of the Record in This Cause Portions of the Record of the Supreme Court of Illinois and Excerpts of Briefs of the Parties in Said Court of Appellee on this the 18th day of September, 1944, at East St. Louis, Illinois.

William H. DeParcq. By Jos. B. McGlynn, Attorneys for Petitioner-Appellant.

STATE OF ILLINOIS,
County of St. Clair, ss:

Josiah Whitnel, first being duly sworn on his oath, states he has this day deposited in the United States mail, full postage prepaid and properly addressed to William H. DeParcq, Attorney, 2535 Rand Tower, Minneapolis, Minnesota, one copy of Motion to Include in and Print as a Part of the Transcript of the Record in This Cause Portions of the Record of the Supreme Court of Illinois and Excerpts of Briefs of the Parties in Said Court of Appellee in the cause above entitled.

Dated in East St. Louis, Illinois, this 18th day of September, 1944.

Josiah Whitnel.

Subscribed and sworn to before me this 18th day of September, 1944. Rose Mary Neal, Notary Public. (Seal.)